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*William Byrd of Westover  
in Virginia Esq.*

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Sept 2 1811

My dear Sir

I have the honor to acknowledge the receipt of your letter of the 21st inst.

and in reply to inform you that the same has been forwarded to the proper authorities for their consideration.

I am, Sir, very respectfully,  
Your obedient servant,  
J. B. Smith

*W. E. P.*

THE  
**NEW VIRGINIA JUSTICE,**  
COMPRISING THE  
OFFICE AND AUTHORITY OF A JUSTICE OF THE PEACE,  
IN  
THE COMMONWEALTH OF VIRGINIA.

TOGETHER  
WITH A VARIETY OF USEFUL PRECEDENTS,  
ADAPTED TO THE LAWS NOW IN FORCE  
TO WHICH IS ADDED  
**AN APPENDIX,**

CONTAINING  
ALL THE MOST APPROVED FORMS IN CONVEYANCING:

SUCH AS

DEEDS OF BARGAIN AND SALE, OF LEASE AND RELEASE; OF TRUST, MORTGAGES,  
BILLS OF SALE, &c.

ALSO,

THE DUTIES OF A JUSTICE OF THE PEACE,

ARISING UNDER THE LAWS OF THE UNITED STATES.

BY **WILLIAM WALLER HENNING**  
ATTORNEY AT LAW.

THE SECOND EDITION,

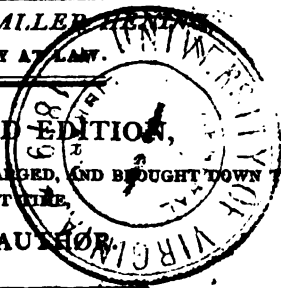
REVISED, CORRECTED, GREATLY ENLARGED, AND BROUGHT DOWN TO THE  
PRESENT TIME

BY THE AUTHOR.

RICHMOND:

PUBLISHED BY JOHNSON & WARNER.

1810.



Virginia

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**DISTRICT OF VIRGINIA, TO WIT:**

BE it remembered, that on the seventh day of October, in the thirty-fourth year of the Independence of the United States of America, William W. Hoising, of the said district, hath deposited in this office the title of a book, the right whereof he claims as author, in the words following, to wit: "THE NEW VIRGINIA JUSTICE, comprising the Office and Authority of a Justice of the Peace, in the Commonwealth of Virginia, together with a variety of useful precedents adapted to the laws now in force. To which is added an Appendix, containing all the most approved forms in conveyancing, such as Deeds of Bargain and Sale, of Lease and Release, of Trust, Mortgages, Bills of Sale, &c. Also, the Duties of a Justice of the Peace, arising under the laws of the United States. By William Waller Henning, attorney at law. The second edition, revised, corrected, greatly enlarged, and brought down to the present time, by the author." In conformity to the act of the Congress of the United States, entitled "An act for the encouragement of learning, by securing the copies of maps, charts, and books, to the authors and proprietors of such copies during the times therein mentioned." And also to an act, entitled "An act supplementary to an act, entitled an act for the encouragement of learning, by securing the copies of maps, charts, and books, to the authors and proprietors of such copies, during the times therein mentioned.....And extending the benefits thereof to the arts of designing, engraving, and etching, historical and other prints."

WILLIAM MARSHALL,  
Clerk of the District of Virginia.



## PREFACE TO THE SECOND EDITION.

A NEW edition of this treatise having been rendered necessary, by the numerous and important changes in our laws which have taken place since the publication of the last impression (particularly in the *penal code*, by the adoption of the Penitentiary System) I have endeavoured, in preparing it for the press, to manifest my gratitude to the public for the very extensive patronage which the early editions experienced.

The whole work has been carefully *revised*; every authority cited has been minutely examined, and errors in *typography* as well as in *doctrine* corrected; new titles and additional matter have been introduced; and the *law*, as settled by the latest judicial decisions, or prescribed by the legislature, has been given.

In citing authorities, I have not confined myself *wholly* to the determinations of the courts of Virginia; nor have I adopted implicitly the decisions of the courts of *Westminster-Hall*, whether pronounced *before* or *since* the revolution. I have endeavoured to make *common sense* and *common honesty* my guide, and whithersoever they lead me, whether to the courts of *England*, of *Virginia*, or of *any of our sister states*, I have invariably pursued their steps. I have not supposed that I was bound to reject a decision of the Court of King's Bench in England, merely because it was pronounced *since* the revolution, although it overruled a decision made *before* manifestly erroneous, and which all the judges have repeatedly said they would long since have decided otherwise, had it been a case of the first impression. Nor have I conceived that the decisions of the several courts in the United States are entitled to less weight, because they were neither delivered nor published in *England*, nor have crossed the Atlantic. All judicial determinations, to be regarded as authority, must be brought to the standard of *justice* and *common sense*.....None other will be *long* respected. It must come to this at last, *that the opinions of good and enlightened men, in whatever quarter of the globe they may be, will alone be considered as settling the law.* In some of the states in the union, the decisions of the courts of England, *posterior* to the revolution, have been proscribed by express act of the legislature; in others they are *generally* received. In some of the state courts, while a *part* of the judges profess to consider

the decisions *prior* to the revolution, as alone to be regarded as binding authority, and *others* receive none as authority which do not conform to their own ideas of propriety, *all the judges* are in the daily habit of citing them indiscriminately.

Judges will listen, with raptures, at an opinion delivered by a chief justice of the court of king's bench, who would startle at the recital of the most luminous opinions, if delivered by an American judge. He would exclaim "*quis novus hic hospes?*" "*What stranger is this?*" when he ought to *know* no judge but through the medium of *sound sense*, and *correct legal principles*.

While I profess and feel the highest veneration for the virtue and talents which have adorned the English Benches of Justice (with one or two solitary exceptions) I am free to own, that, in my judgment, *too much* respect has been paid to their decisions, and *too little* to those of the American courts. Among the judges in the United States, there are men who would cast a lustre on any tribunal upon earth. On what principle, then, is it that their opinions are so seldom quoted, while those of men inferior in legal attainments, are received as the standard of correctness? It can only be ascribed to the *inveteracy of habit*, and the *prejudices of education*.

Again, it must be admitted, that the leading principles of every government, naturally infuse themselves into the laws of the country. In England, the government is *monarchical*, and the policy of their laws has been to support an order in society distinct from the great body of the people, and to invest them with certain peculiar privileges. Hence the doctrine of primogeniture-ship, and the affection for the *heir at law* has been perpetuated, though it took its rise in feudal principles. In America, all the features of our governments are strongly *republican*, and the policy of our laws directs to an equal distribution of property. In England the judges *may*, and too often *have*, leaned to the prerogatives of the crown: in the United States we have no privileges, no prerogatives. Is it not, therefore, much more likely that the decisions of our judges should conform to the principles of our governments, than that we should be able to trace them in the decisions of the courts of England? And is it not much more probable that, by an interchange of ideas, on questions of law, among the American judges, they will establish a system of laws more congenial to our republican institutions? Let every dispassionate man decide.

WILLIAM WALLER HENING.

Richmond, October 14th, 1809.

## PREFACE TO THE FIRST EDITION.

THE importance of the subject, of which the author has treated in the following work, has created, in him, an unusual share of diffidence, in submitting it to the public. He is sensible that even on the most extensive plan, it would have been a work of immense difficulty to convey the necessary information on all the various objects which fall under the jurisdiction of a magistrate, both as a conservator of the peace, and as a judge of record. But when, in attempting this, he was confined to the narrow limits of a single octavo volume of six hundred pages, the difficulty became considerably greater, and his hopes of attaining to any degree of perfection, were proportionably diminished. It may, indeed, be asked, why was the plan of the work so limited, as to preclude the admission of *every thing* which related to the office of a Justice of the Peace in his several capacities? To those, who consider, that, in this state, the only compensation which a magistrate receives for his services, is, a consciousness of having acted from patriotic motives, in the acceptance of a laborious office, and thus discharging his duty as a member of society, the answer is obvious. Frugality, then, became an essential part of the plan. But the author would by no means infer that his attention to that point, has drawn him into a neglect of the more useful parts of the publication. He is well assured that in comparing this treatise with any other now extant, it will be found to contain not only more useful information on the same subjects, but a greater variety of *precedents*, besides several *additional titles*, unnoticed in any other book of the kind hitherto published either in Great Britain or America.

Doctor Burn's Justice published in England, and Mr. Starke's in Virginia, have long afforded considerable assistance to our Magistrates. But as the former was calculated for the meridian of the country in which it was written, and the latter was published during our subjection to a regal government, and before our laws had acquired any degree of stability; it could not escape the observation, of any person, from the most superficial view of those books, that some other guide was indispensably necessary. The *defects* of these writers, then, as they respect the present situation of America, are rather to be ascribed to the materials



from which their works were formed, than a want of judgment in the authors themselves. Their *reputation* is too well established to require the aid of panegyric, and the author hopes that no expression of his will be tortured into a meaning that he wishes to detract from it.

Convinced of the necessity of such a publication, at this time, and flattered by the assurances of many of the author's friends, that he was not wholly unqualified for the task, he was prevailed on to undertake the present work. How far he has succeeded must be submitted to the impartial judgment of his fellow citizens.

The materials of which this book is composed, have long been collecting, and would have assumed the form of a volume before now, had not the prospects of a republication of our laws (for which the legislature made provision in the year 1789) made it necessary to wait the completion of that event. No time has been lost in hastening this publication, since the revised code of laws, has been so far advanced, as to enable the author to avail himself of the use of it.

With respect to the books of authority, he has made use of all such as are deemed sufficiently authentic, and has generally adopted their own words, with a proper reference to the several parts of the book, where the doctrine may be found. In some instances, indeed, he has taken the liberty of varying the expression so as to make it more agreeable to the ears of our republican citizens: Thus, instead of the words *king* and *subject*, he uses the expressions *executive* or *commonwealth*, and *citizen*. This he hopes will render the work more generally useful, without affecting the sense of the author.

He has, as far as possible, avoided the insertion of any Latin words in the body of the work: Conscious that to *be useful*, not to *appear learned*, has been his principal object; and sensible that this book will fall into the hands of many who are strangers to that language. Some technical words, indeed, or terms of art, are retained, because having been in common use they are generally known and have become a part of our language. But, for the use of those who have not been conversant in legal proceedings, he has prefixed "*An Explanation*" of such law terms as have occurred in the course of the present work.

It may be an objection with some that the great number of Indictments introduced into this work, has unnecessarily increased the size of the book, in exclusion of other matter; but the author could not otherwise discharge his obligations to the gentlemen of the bar, who have so generally promoted this publication; nor will they be found wholly unuseful to the Magistrates themselves, as



by observing the mode of expression in the description of the offence in the indictment, they may draw their *Mittimus* less liable to exception than has usually been done.

The Appendix, so far as it relates to the duties of a Justice of the Peace arising under the laws of the United States, has become a necessary appendage to the work from many of the objects of a magistrates jurisdiction under the state governments, having been transferred to the Congress of the United States. The other part of it containing forms of conveyancing speaks its own utility.

To conclude : The author flatters himself, that on perusing this work, it will be found that nothing material relating to the office of a Justice of the Peace, *out of court*, has been omitted. That many important points of legal knowledge respecting the practical part of his duty, *in court*, are conveyed....that private gentlemen, as well as the several officers of court, will find in it much useful information, and that in every instance, he has far exceeded his engagements with the public.



## EXPLANATION OF LAW TERMS.

## A.

**ABATEMENT.** 1. *In lands*; is when a man dies seized of an inheritance, and before the heir or devisee enters; a stranger, who has no right, makes entry, and gets possession of the freehold (3 *Bl. Com.* 167. T. L. 4. *Cow. Int.*) 2. *Of a writ, count, or suit*; as, in the two former cases, by misnaming the defendant, which is called a *misnomer*, giving him a wrong addition, a variance between the writ and declaration, or between the writ and specialty, or record, or uncertainty in the writ or declaration (or suing some only of joint partners, 3 *Bl. Com.* 302 *Christ.* note 3) or that the plaintiff is an alien enemy, that a woman plaintiff is married before, or pending the suit, that another action is depending for the same cause, that the writ is dated before the action accrued, that the defendant ought to be sued in another court, &c. In these and like cases, the defendant may pray that the writ or plaint may cease for that time, and that the plaintiff may begin his suit again if he pleaseth. But if the defendant plead in *bar*, to annul the action for ever, he cannot afterwards plead in abatement (T. L. 2. 3.) or the death of the plaintiff or defendant, will at once abate the suit (3 *Bl. Com.* 302. T. L. 2.) 3. *Of nuisances*; which is the removal, by the act of the party, of whatever unlawfully annoys, or does damage to another, as the erection of a wall so near a man's house, as to obstruct his ancient lights, or a gate across a public highway, &c. But it must be done without any riot (3 *Bl. Com.* 5.) 4. *Of an indictment*, as for a *misnomer*, or a false addition to the prisoner. 4. *Bl. Com.* 334.

**NOTE.**.....No plea in *abatement*, or of *non est factum* can be received, by the laws of Virginia, unless they be verified by oath or affirmation, (1 *Rev. Code.* 80); and, as to pleas in *abatement*, the same rule obtains in England. See 3 *Bl. Com.* 302. *Christ.* note (3). For more of abatements by *plea* and the *death of the parties*, see Indexes to first and second vols. of *Rev. Code.*

**Abearence.** Good *abearence* means good behaviour (4 *Bl. Com.* 256.) In this sense it is used in a law of Virginia, of March 1659-60. See 1 *Stat. at Large*, 535.

*Abeyance*, is where the fee-simple is in expectation, remembrance, or contemplation of law; (2 *Bl. Com.* 106) as, in a grant or devise to A. for life, and afterwards to the right heirs of J. S. who is living: the vesting of this remainder depending upon the death of J. S. in the life time of A. and leaving an heir, the free-hold is said to be in *abeyance*; as the logicians say, *in posse*; and in common parlance, *in nubibus*, or *in the clouds* (T. L. 6. 2 *Bl. Com.* 107.) But Mr. *Fearne* very elaborately, and, as it is supposed, successfully combats this idea, and contends that the inheritance remains in the grantor or devisor and his heirs, until the contingency happens. See *Fearne's Cont. Rem.* 441. 5th edit. and 513. 4th edit. Also, 2 *Bl. Com.* 107. *Christ.* note (2).

*Ab initio*, "from the beginning."

*Abjuration*, is used in three senses, in the English law. 1. The oath anciently taken by a person to forsake the realm for ever, who had committed a felony and taken sanctuary in a church, or other privileged place; the ceremonies attending which may be seen in *Termes de la Ley*. 8. 2. To secure the *established religion*; by requiring that persons convicted of certain kinds of *recusancy* should *abjure* the realm (Harg. note (2) to Co. Lit. 92. b. 3. To secure the *succession to the crown*, by abjuring the *pretender*; which last oath must be taken by all persons in any office, trust or employment. 1 *Bl. Com.* 368. Harg. Co. Lit. *ubi supra*.

*Absque hoc*, "without this," are the technical words used in pleading a *traverse*. So, *et non*, "and also," are sufficient words of *traverse*. 1 *Saund.* 22. 1 *Lev.* 192. S. C. 1 *Ld. Raym.* 356.

*Ac etiam*, "and also."

*Ad quod damnum*, is a writ which issues to ascertain what injury will accrue to the commonwealth, or to individuals, by granting any privilege; as a fair, or market, leave to establish or alter a road or highway, to erect a mill, &c. T. L. 28.

*Affessment*, is the assessing of a fine according to the degree of the offence, and the circumstances of the party, in cases where the law prescribes no particular penalty. This is performed by *assessors*, who are sworn to *affere*; that is, to tax the *general* fine according to the particular circumstances. T. L. 30 4 *Bl. Com.* 379.

*Ademption*, is particularly applied to the taking away of a legacy; as if the testator, in his life time, appropriated to his own use the subject which he had bequeathed to another. *Ca. temp. Talb.* 227.

*Affidavit* (the perfect tense of the verb *affido*) is a voluntary oath taken before some person who has authority to administer it. Affidavits differ from depositions in this: that they are generally voluntary; do not require a commission to authorise the taking of them; and are generally used on motions; as to dissolve injunctions, and the like.

*Agistment* (from *gister*, Fr. i. e. *stabulari*, a word proper to deer) is the taking in of horses or other cattle to graze and depasture on a man's lands. 2 *Bl. Com.* 452 T. L. 34. *Cow. Int. Spelm. Gloss.*

*Aid prayer*, where tenant for life, in dower, by curtesy, &c. is sued, they may pray the *aid* of him that hath the inheritance in remainder



or reversion, to be joined in the action and defend the suit. 3 *Bl. Com.* 300. T. L. 37. See 2 *Saund.* 45. c.

*Alias.* A second or further writ, after a former hath been sued out without effect. "We command you as we have *formerly* commanded you," *sicut alias præcipimus.* 3 *Bl. Com.* 283.

*Alien* (*alienare*, Lat. *alienare*, Fr.) is to transfer the property of any thing to another person. *Alien* (*alienus*, Lat.) is a person born in a strange country. *Cow. Int.*

*Alibi*, "in another place." A species of evidence often resorted to in criminal prosecutions, but which should be heard with great caution. *Fost.* 368.

*Allodial property*, is that which is holden of no superior. 2 *Bl. Com.* 47. 60.

*Alluvion*, is the gaining of land from the sea; either by *dereliction*, as where the sea recedes below the usual water mark, or by the washing up of sand and earth, so as in time to make *terra firma*. If this gain be by small and almost imperceptible degrees, it shall go to the owner of the land adjoining (2 *Bl. Com.* 262. *Harg. Law Tracts*, 28.) So, sea-weed cast on the shore shall go to the owner of the soil adjoining, and not to the first occupant (2 *Johns. N. Y. Rep.* 313.) So, it has been held, that whatever addition is made to the shores of rivers, &c. by *alluvion*, from natural causes, or from an union of natural and artificial causes, shall belong to the owners of the shores. 3 *Mass. T. R.* 352.

*Ambidexter*, is he who, when a suit is depending, takes money of the one side and of the other, either to labour the suit, or the like; or if he be of the jury, to give his verdict. T. L. 43.

*Amercement*, or *amercement*, is properly a pecuniary penalty assessed by the peers or equals of the party amerced (*in misericordia*) for an offence done. And the difference between *amerciements* and  *fines* is, that the former are arbitrarily imposed by the assessors, the latter are certain and expressly grown out of some statute. (T. L. 44. *Cow. Int.*) Another difference is, that  *fines* are always imposed and assessed by the court, but an *amerement* is assessed by the country. 8 Co. 39. a.

*Amicus Curie*, "a friend of the court." If a judge be doubtful or mistaken in a point of law, a stranger may speak to the subject, and offer his sentiments as an *amicus curie*. So if there be errors apparent in the writ, count, avowry, inquest or indictment, or if the action be abated by death. Sec 2 *Vin. Ab.* 4. 6. *Hardr.* 86. *Comb.* 13. 33. 170.

*Anno Domini*, "in the year of our Lord." The computation of time, from the incarnation of our Saviour.

*Apportionment*, is the dividing of a rent into parts, accordingly as the land out of which it issues is divided among one or more proprietors; as if a person having a rent-service issuing out of land, purchase part, or a stranger recovers part, &c. the rent shall be apportioned. See T. L. 51. *Gilb. Rents.* 147. 151.

*Array*, is the panel of the jury returned by the sheriff. And when the whole jury is challenged, as on account of partiality or some de-

fault in the sheriff, it is called a *challenge to the array*. 3 *Bl. Com.* 359.

*Assumpsit*, according to its legal import, signifies a voluntary promise made either verbally, or in writing, without seal, upon a good consideration, whereby a man assumes and takes upon himself to perform or pay any thing to another (2 *Comyn. on Cont.* 549.) Technically an action of *assumpsit*, is merely a species of the action of *trespass on the case* (*ibid.*) And is either a general *indebitatus assumpsit*, or a *special assumpsit* (*ibid.*) An *assumpsit* is either *express* or *implied*, (3 *Bl. Com.* 158, 159) and the action is confined to agreements by *parol*; the action of covenant or debt, being the proper remedy for the non-performance of agreements by specialty; (*Selw. N. P.* 39) and if agreements are merely *written*, and not specialties, they are *parol* agreements. (*ibid.*)

*Attornment*, is the tenant's acknowledgment of a new landlord. (2 *Bl. Com.* 288-9.)

*Audita querela*, is where a defendant, against whom judgment is recovered, and who is therefore in danger of execution, or perhaps actually in execution, may be relieved upon good matter of discharge, which has happened *since* the judgment: as if the plaintiff hath given him a general release, &c. And an *audita querela* is in the nature of a bill in equity. 3 *Bl. Com.* 405-6.

*Averment*, in pleading, is the positive assertion of some fact; as, in special pleas, which always advance some new fact not mentioned in the declaration, they must be *averred* to be true in the common form; "and this he is ready to *verify*," "*et hoc est paratus verificare*." 3 *Bl. Com.* 309.

*Avowry*, is where a person takes a distress for rent in his own right, or the right of his wife, he *avows* and sets forth in his plea the reason of it: if he justifies in another's right, as bailiff, &c. he makes *cognisance*; that is, *acknowledges* the taking, but insists it was legal. 3 *Bl. Com.* 150.

*Auter Droit*, "*in right of another*." 2 *Bl. Com.* 177.

*Auterfoits acquit*, "*a former acquittal*." 4 *Bl. Com.* 335.

*Auterfoits convict*, "*a former conviction*." 4 *Bl. Com.* 336.

*Auterfoits attain*, "*a former attainder*." 4 *Bl. Com.* 336.

*Auter vie*, "*the life of another*." 2 *Bl. Com.* 120.

## B.

*Bailiff* (*Balkvus*, Lat. *Bailif*, Fr.) is an officer deputed by the sheriff, in England, to execute process, &c. (1 *Bl. Com.* 345.) From this word came the term *bailiwick* (*balliva*) which signifies the *county* or extent of the sheriff's jurisdiction; and *both* words were introduced by the princes of the Norman line, in imitation of the French, whose territory was divided into *bailiwicks*, as that of England into counties. *Cow. Int.*

*Banns* (*Bannus*, Lat.) among the feudists, signified a proclamation, or public notice; but in statutes, it is used for the publication of matrimonial contracts in the church before marriage. T. L. 86. *Cow. Int.*

**Bar**, in a legal sense, is a plea or peremptory exception of a defendant, sufficient to destroy the plaintiff's action for ever. See 3 *Bl. Com.* 306. T. L. 87.

**Baron and Feme**, in old law books, used for "*Husband and Wife.*" *Bona fide*, "*with good faith*," honestly, without fraud, &c.

**Bona Notabilia**, are the goods which a decedent has out of the jurisdiction of the court in which he dies. *Perk.* sec. 489. *Godolph.* part 1. ch. 22. 2 *Bl. Com.* 509.

**Bote**, is an old word signifying *help, succour, aid, or advantage*, and is commonly joined with another word, whose signification it augments; as, *bridge-bote, fire-bote, hedge-bote, plow-bote*, &c. T. L. 101. See 2 *Bl. Com.* 55.

**Brief, Breve** (*Brevis*, Lat. *Breif*, Fr.) A writ or process issuing from a court; so called, because it *briefly* comprehends the cause of action (T. L. 101.) *Briefs* are also letters patent granted for collecting charitable benevolence to poor sufferers by fire, or other casualties. (*Bailey's Dict.*) In this last sense the word is used in a law of Virginia of 1653. See 1 *Stat. at Large*, 381.

## C.

**Calling the plaintiff.** A ceremony used when the plaintiff suffers a *non-suit*. 3 *Bl. Com.* 376.

**Capias** (from one of the initial words, while the proceedings were in Latin) is of two sorts, either a writ in a personal action, which issues before judgment, or an execution which issues afterwards. T. L. 109.

**Capias ad audiendum judicium.** If the defendant be found guilty of a misdemeanor (the trial of which may, and does usually, happen in his absence, after he has once appeared) a *capias* is awarded and issued, to bring him in *to receive judgment*; and, if he absconds, he may be prosecuted even to outlawry. 4 *Bl. Com.* 375.

**Capias ad respondendum**, is a writ commanding the sheriff to take the body of the defendant, if he may be found in his bailiwick or county, and him safely keep, so that he may have him in court on the day of the return, *to answer* the demand of the plaintiff (3 *Bl. Com.* 289.) In England, this is called a *judicial writ*, and is grounded on the return of an *original*, in the same cause (*ibid.*) But, in Virginia, the *capias* issues, as an *original*, in the first instance.

**Capias ad satisfaciendum**, is an execution against the body of the defendant, by which the sheriff is directed to take him, and have him in court, on a day therein named, to make the plaintiff *satisfaction* of his demand. 3 *Bl. Com.* 414.

**Capias pro fine**, is a process which issues against a person who is fined (generally for some offence against a statute) commanding the sheriff to take him, and commit him to prison until he pays the fine. 3 *Bl. Com.* 398.

**Capias utlagatum**, is a writ by which the body of the defendant is arrested, after outlawry, and committed till the outlawry be reversed. 3 *Bl. Com.* 284.

*Capiatur*. If the judgment be against the defendant, in all cases of force, of falsehood in denying his own deed, or unjustly claiming property in replevin, or of contempt in disobeying the command of the commonwealth's process, or the express prohibition of any statute, it is also considered that the defendant *capiatur*, or "may be taken." 3 *Bl. Com.* 398.

*Capita*. Distribution or succession *per capita*, is where the estate goes to every person in an equal share, claiming in their own rights, and not in right of representation. 2 *Bl. Com.* 517. 218.

*Casus omisus*, is where any particular thing is omitted out of, or not provided for, by a statute, &c.

*Caueat* (as used in ecclesiastical law) is a *caution* entered in the spiritual court, to stop probates, administrations, licences, dispensations, faculties, institutions, and such like, from being granted, without the knowledge of the party that enters it. 1 *Burn's E. L.* 264.

*Capi Corpus*, is a return made by the sheriff, on a writ, that he hath taken the body of the party. T. L. 116.

*Cestui que trust*, is he for whose benefit the trust of an estate is committed to another; the person to whom it is committed, is called the trustee. Sand U. & T. 61, 62. 1 *Cruise Dig.* 492. *Sug. L. Vend.* 401.

*Cestui que use*, is he for whose use an estate is conveyed to another; the person to whom it is conveyed, is called the *feoffee*. Sand U. & T. 27. 1 *Cruise Dig.* 429. 2 *Bl. Com.* 328.

*Cestui que vie*, is he on whose life any lands are held. 2 *Bl. Com.* 123.

*Charters* (*Chartæ*, Lat. *Chartres*, Fr.) in law, signify writings, deeds, instruments, &c. chiefly relating to lands. T. L. 131. *Cow. Int.*

*Chimin* (*Chiminus*, law Lat. *Chemin*, Fr.) A way or road; either a highway, or private way. T. L. 135. *Cow. Int. Comy. Dig. Tit.* "Chimin."

*Chose* (*Res*, Lat. *Chose*, Fr.) a thing. Thus, a *chose en action*, is a thing in action. T. L. 141. *Cow. Int.* 2 *Bl. Com.* 397.

*Clausum fregit*. From the words of the writ in an action of trespass, for an unlawful entry on the land of another; the defendant being commanded to shew cause, *quare clausum guerentis fregit*, "wherefore he broke the plaintiff's close." 3 *Bl. Com.* 209.

*Clerk* (*Clericus*) has two significations; the one is the title of a person belonging to the ministry of the church, as *minister*, *clergyman*, &c.; the other denotes those who by their functions use their pen in any court or otherwise. T. L. 148. *Cow. Int.*

*Cocket* (*Cocketum*, law. Lat.) in the old statutes, means a seal belonging to the custom house; also, a scroll of parchment sealed and delivered by the officers of the custom-house; to merchants, as a warrant that their goods are customed. T. L. 150. *Cow. Int.*

*Codicil* (*Codicillus*) is a supplement to a will; or an addition made by the testator, and annexed to, and to be taken as a part of, a testament: being for its explanation, or alteration, or to make some addition to, or else some subtraction from, the former dispositions of the testator. 3 *Bl. Com.* 500.



*Cognizance*, or *Conusance* (*Cognitio*, Lat. *Cognisance*, Fr.) is variously used; sometimes as the acknowledgment of a fine, or confession of a thing done; sometimes the acknowledgment of making a distress; and sometimes the hearing of a matter judicially, as to take cognizance of a suit, &c. *Cow. Ins.*

*Cognovit actionem*, is the defendant's confessing the plaintiff's action, or a part thereof. See 2 *Bl. Com.* 304. 397.

*Colloquium*, a talking together. Thus, for words spoken, it must be laid in the declaration that the defendant speaking of and concerning the plaintiff, &c. So, in actions on the case it is said, a certain *discours* was had and moved, &c. See *Carth.* 90. *Lill. Ent.* 17, 18, 19, 22. *Cowp.* 672.

*Color of action*, is a term in pleading, which, from late adjudications, has become more a matter of curiosity than real use. See 3 *Bl. Com.* 309. *Tidd. Prac.* 599. 1 *East.* 215.

*Color of office*, is always taken in the worst part, and signifies an act wrongfully done by the countenance of an office. But, by reason of the office, and by virtue of the office is always taken in the best part. *T. L.* 156.

*Congeable* (*Conge*, Fr.) *lawful*, or lawfully done; as "entry congeable" *Lit. sec.* 410. *T. L.* 181.

*Continuando*. In trespass, it is called laying the action with a *continuando*, when the plaintiff alleges the trespass to have been committed by continuation from one given day to another. This is done to prevent the necessity of bringing separate actions for each day's separate offence. 3 *Bl. Com.* 212.

*Coram non iudice*, is where a cause is brought and determined in a court, of which cause the judges have no jurisdiction.

*Curia advisare vult*, is the entry made when the court take time to deliberate upon any point of difficulty, before they give judgment in a cause.

## D.

*Damage feasant*, "doing damage." As distraining cattle *damage feasant*. 3 *Bl. Com.* 6.

*Damnum absque injuria*, is a damage which a man may sustain without receiving an injury, for which there is any redress at law. As by the establishment of a school in the same neighbourhood with another, &c. 3 *Salk.* 10.

*De bene esse*, signifies that the thing done may be good for the present; but not if the party has it in his power to proceed by the ordinary method. 3 *Bl. Com.* 383. *Tidd. Prac.* 222.

*Debet et detinet* ("he owes and detains") is the technical designation of the action of debt. If it be brought against the contracting party himself, or the heir, where the heir is expressly bound by the ancestor, it must be in the *debet* and *detinet*; (1 *Esh. N. P.* 216.) so, debt may be brought against an executor suggesting a *devastavit*, in the *debet* and *detinet*; (*ibid.* 217.) but if it be brought in the *detinet* only, it is good at least after verdict; but the judgment must be *de bonis testa-*



*toris* (3 East. 2. S Hen. & Munf. *Spotwood v. Price, &c.*) But if it be brought by or against an executor or administrator for a debt due to or from the testator or intestate, it must be in the *detinet* only (1 'Esh. N. P. 217, 218. 3 Bl. Com. 156.) But, where the executor makes himself chargeable to the testator's estate, it shall be in the *debet* and *detinet*; as where he sells goods of the testator, and brings debt for the money; or takes a bond in his own name, calling himself executor, &c. 1 'Esh. N. P. 218.

*De bonis propriis*, "of his own proper goods."

*De bonis testatoris*, "of the goods of the testator."

*Dedimus potestatem*, is usually a commission which issues to some persons in the country, giving them power to do some act appertaining to a case in court; as to take depositions, &c. Cow. Int.

*De melioribus damnis*, is the election given the plaintiff in an action of trespass to take judgment, of the greater damages, where there is judgment against two or more defendants, See 1 Wils. 30.

*De novo*, "anew, over again."

*Devastavit*, "waste," by an executor or administrator.

*Dimes* (*Decime*, Lat.) "*Tithes*." Cow. Int. Comy. Dig. Tit. "DISES."

*Distringas*, is of various kinds, and is a writ directed to the sheriff or other officer commanding him to distrain the defendant or delinquent by his lands and chattels, so that neither he nor any one for him lay hands on them, until another order be received from the court, and that the sheriff or officer answer for the issues, &c. so that the requisition of the writ may be complied with. See Reg. Brev. 92. a. Tidd. Prac. F. (Riley's edit.) 22, 23, 183, 184, 257, 274, 275.

*Droit*, "right." T. L. 315.

*Duces tecum*. See *Subpoena duces tecum*.

*Durante absentia*, is the granting administration during the absence of the executor. 2 Bl. Com. 503.

*Durante minore etate*, is the granting administration during the minority of the executor. 2 Bl. Com. 503.

## E

*Eigne* (Fr.) "the eldest, or first born." T. L. 320.

*Elegit*, a writ of execution by which the sheriff is to deliver all the defendant's goods, by appraisement of a jury (except oxen and beasts of the plough) and half his lands to the plaintiff, in satisfaction of his debt. 3 Bl. Com. 418. See particularly Tidd. Prac. 938. &c. Tidd. Prac. F. (Alb. edit.) 223.

*Emblements*, the annual profits of land. See 2 Bl. Com. 122. 403. Co. Lit. 55. a. b.

*Escrow*, is a deed delivered to a third person, to be the deed of the party, upon a future condition. T. L. 350.

*Estoppel*, is when a person is concluded and forbidden in law to speak against his own act. T. L. 356.

*Estreat*, of a recognizance, is to extract or take it out from among the other records, for the purpose of suing upon it, when forfeited. 4 Bl. Com. 253.

*Exigent*, or *exigi facias*, is a writ which issues previously to an outlawry, and commands the sheriff to proclaim the defendant at five county courts. It lies in actions personal, where the defendant cannot be found, nor hath any thing within the county whereby he can be attached or distrained (T. L. 367. 3 *Bl. Com.* 283.) In an indictment for felony the *exigent* shall issue after the first *capias*; and so after a *capias ad satisfaciendum*, and every *capias* which goes forth after judgment (T. L. 367.) So, it may issue in case of misdemeanors. See 4 *Bl. Com.* 319. *Tidd. Prac.* 127, &c.

*Exoneretur*, the entry of a discharge of the bail, on the bail piece. See *Tidd. Prac.* 241.

*Ex officio*, is so called from the power which an officer has, by virtue of his office, to do certain acts, without being particularly applied to.

*Ex parte*, an act done, or proceeding had by one party only.

*Ex post facto* laws, properly so called, is when after an action (indifferent in itself) is committed, the legislature then for the first time declares it to be a crime, and inflicts punishment on the person who committed it. 1 *Bl. Com.* 46.

*Extinguishment*, of rent, is where the lord purchases the tenancy out of which the rent issues. *Gilb. Rents* 149.

## F.

*Faculty*, is a word often used in the old statutes, and signifies a privilege or special dispensation. T. L. 373.

*Feigned issue*, is usually directed by the court of chancery to try some disputed fact by a jury. It is called a *feigned issue*, because, in form, the parties try the point by charging that a wager was laid, &c. See 3 *Bl. Com.* 452. *Tidd. Prac. F.* (Riley's edit.) 172.

*Felo de se*, "a felon of himself."

*Feme covert*, a married woman.

*Feme sole*, a single woman.

*Fera natura*, animals of a wild nature, in which a person cannot have an absolute, but only a qualified property. 2 *Bl. Com.* 390.

*Fieri Facias*, is an execution against the goods and chattels; so called from the initial words in the writ, while all the proceedings were in Latin. 3 *Bl. Com.* 417.

*Forma pauperis*, "in the form of a poor person," is where a person being too poor to bear the expences of a law suit, is permitted by the court to prosecute free from expence. 1 *Rev. Code* 238.

*Formedon* (*forma donationis*) is a writ which lies for the heir, reversioner, or remainder man of tenant in tail; and is called a writ either in the descender, remainder or reverter. See T. L. 398.

## G.

*Garnishment* (*Garnir*, Fr.) is a term used in an action of detainee, when the defendant says that the property was delivered to him by the plaintiff and another upon certain conditions; and therefore prays that that other may be warned to plead with the plaintiff; a writ of

*scire, facias* shall go against the plaintiff; and this petition of the defendant is called praying garnishment; and the other when he comes shall plead with the plaintiff, and that is called *interpleader*. T. L. 416. *Cow. Int.*

## H.

*Habendum*, is that part of a deed which ascertains what estate is granted by it. 2 *Bl. Com.* 298.

*Habere fucias siesinam*, is an execution for the possession of a freehold. If it be a chattel interest, and not a freehold, the writ is a *habere fucias possessionem*. 3 *Bl. Com.* 412.

*Hosteler*, an inn-holder. T. L. 448.

*Hustings* (*Hustingum*, *Hustingua* law Lat. *Hus*, a house, and *things*, causes or *pleas*, Saxon. 4 *Inst.* 247) is the highest court held in London by the mayor and aldermen; and the same term has been extended to the courts of other corporate towns. T. L. 450.

## I.

*Imparlance* (*licentia loquendi*, abbreviated *li. lo.*) is the time allowed to plead. See 3 *Bl. Com.* 299. *Tidd. Prac.* (Riley's edit.) 417.

*In esse*, "in being."

*Innuendo*, is a word used in legal proceedings (especially in actions for slander) to ascertain the meaning of any doubtful word or expression, by averring that the sense appropriated to it, is its true meaning. See 3 *Bl. Com.* 126. 1 *Term Rep.* 63.

*Inimul computassent* ("that they had accounted together") is a count used in a declaration, in *assumpsit*, upon an account stated between the plaintiff and defendant. 3 *Bl. Com.* 164.

*Instanter*, "immediately." But, in England, a rule to plead *instanter*, means within twenty-four hours. *Tidd. Prac.* (Riley's edit.) 508, note (y).

*Interpleader*, is, when in the progress of a cause it becomes necessary to discuss the right of some other party, before the principal cause can be determined. The parties are said then to *interplead*. It is a proceeding usual in both courts of equity and of law; and in the latter chiefly confined to actions of detinue. See 3 *Bl. Com.* 448. *Mit. Plead.* 125. T. L. 335. *Rast. Ent.* 213.

*Issues*. An *issue* is the end of pleading (3 *Bl. Com.* 314.) *Issues* are the profits of the defendants lands taken on a *distringas*. 3 *Bl. Com.* 280.

## J.

*Jeofail*, is compounded of the French *J'ay faille*, that is *ego lapsus sum*, "I have failed," and signifies an oversight in pleading, or other law proceedings. *Cow. Int.*

*Journies...accounts* (*dieta computata*) is a term used for renewing a

suit within a *reasonable time* after it has abated by death. See T. L. 468. 6 Co. 9, b. *Tidd. Prac.* (Riley's edit.) 267.

## L.

*Laches*, "Negligence."

*Levant and Couchant*, are terms applied to cattle, that have been so long on the ground of another, that they have *lain down* and are *risen again* to feed; which in general is supposed to have been *a day and a night*. 3 Bl. Com. 9.

*Levari facias*, is a writ of execution, commanding the sheriff to levy a sum of money upon the lands, tenements and chattels of a person who has forfeited a recognizance (T. L. 479.) It is also founded on judgments generally; and affects the goods and *profits* of a man's land, whereby the sheriff may seize all his goods, and receive the rents and profits of his lands, till satisfaction be made to the plaintiff (3 Bl. Com. 417.) It is also a proper process after the returns of the writ of *capias utlegatum*. *Tidd. Prac.* 136-7.

## M.

*Mainour* (*Manier*, Fr.) When a thief is taken with the thing stolen in his hand, *in manu*, he is said to be taken *with the manour*. 4 Bl. Com. 307. *Cow. Int.*

*Mandamus*, is a writ of an extensively remedial nature; and in general, it may be defined to be a writ issuing from a superior court, commanding the judges of an inferior court to do justice according to the powers of their office, whenever the same is delayed. 3 Bl. Com. 110.

*Mensa et thoro*. A divorce *a mensa et thoro*, is a separation from "bed and board," as it is technically called. 1 Bl. Com. 440.

*Melius inquirendum*, is a writ which issues for a *further or better inquiry*, after an inquisition returned, on which it is suggested the valuation was too low. See *Tidd. Prac.* 136-7.

*Mesne*, "intermediate."

*Misnomer*, a misnaming. 3 Bl. Com. 302.

*Mittimus*, a warrant from a justice to *commit* an offender to jail. 4 Bl. Com. 300.

*Mollitur manus imposuit*, is a plea of justification in an action of trespass, assault and battery, that the defendant *gently laid his hands* on the plaintiff. 3 Bl. Com. 121.

*Monstrans de droit*, "a manifestation of right." See 3 Bl. Com. 256.

## N.

*Ne exeat*, &c. A writ issuing out of the court of chancery to restrain a person from going out of the state. *Mit. Plead.* 46.

*Negative pregnant*, in pleading, is when the defendant pleads a negative plea, which is not so special, but that it includes also an affirmative: as if a man be charged with doing an act on a particular day, &c.

and he pleads that he did not do it in manner and form as stated in the declaration, it may be implied that he did it in some other manner, &c. T. L. 511.

*Nil debet*, "he owes nothing." The proper plea to an action of debt on simple contract. *Tidd. Prac.* 593.

*Nil dicit*, is a failing by the defendant, after appearance, to plead to the plaintiff's declaration; whereupon judgment is entered against him, because *he saith nothing*. T. L. 514.

*Nil habuit in tenementis*, is a plea in an action of debt for rent, that the plaintiff *hath nothing in the tenement*. *Esp. N. P.* 232.

*Nolle prosequi*, is a voluntary relinquishment of a prosecution, by the attorney for the commonwealth. It is also an acknowledgment by the plaintiff, in a civil action, that he will not further prosecute his suit, as to the whole or a part of the cause of action; or where there are several defendants, against some or one of them. See *Tidd. Prac.* 630, and the cases there cited.

*Nomine pene*, is a penalty incurred for the non-payment of rent, and the like, at the day appointed by the lease or agreement for payment thereof. 2 *Lill. Prac. Reg.* 283. *Hob.* 82.

*Non assumpsit*, is the plea of the general issue, in an action of *indebitatus assumpsit*, whereby the defendant saith that *he did not assume*. See *Tidd. Prac.* 591, as to what may be given in evidence under this plea.

*Non assumpsit infra quinque annos*, is the plea of the statute of limitations, that the defendant *did not assume within five years*.

*Non compos mentis*, a person of unsound mind.

*Non culhabitis*, "not guilty." The plea of the general issue, in trespass *vi et armis*, or on the case. 3 *Bl. Com.* 305.

*Non damnificatus*, is a plea to an action of debt upon a bond, with condition to save the plaintiff harmless; in which the defendant may plead that the plaintiff is *not damaged*. But if the condition be to *discharge* the plaintiff, &c. then the *manner* of discharging him, &c. ought to be specially pleaded. 2 *Lill. Prac. Reg.* 286.

*Non demisit*, a plea in an action of debt for rent, on a parol lease, that the plaintiff *did not demise* the premises to the defendant. *Tidd. Prac.* 595.

*Non detinet*, the general issue in an action of detinue, that the defendant *did not detain*. *Schw. N. P.* 596.

*Non est factum*, is a plea to an action of debt on a bond or deed, which is void (and not merely voidable) or which was never executed by the defendant. Whereupon he may plead "*it is not his deed*." 3 *Bl. Com.* 305. 2 *Lill. Prac. Reg.* 288.

*Non est inventus*, is the sheriff's return to a writ when the defendant is *not found* within his bailiwick.

*Non infregit conventionem*, is when the defendant, to an action of covenant, pleads that *he hath not broken the covenant*. But it is generally a bad plea. *Tidd. Prac.* 593. 8 *Term Rep.* 278.

*Nonpross*....*Nonsuit*, is indifferently used, where the plaintiff does not prosecute his suit with effect; or, upon trial refuses to stand a verdict. He is then said to be *nonpross'd* or *nonsuited*, from the words formerly



used in entering up the judgment, *non prosequitur sectam*, &c. A nonsuit is not a bar to a subsequent action as a retraxit is. 3 *Bl. Com.* 295-6. *Tidd. Prac.* 412. 2 *Lill. Prac. Reg.* 292.

*Non sum informatus*, is when the defendant's attorney declares that he is not informed of any thing to say in answer to the plaintiff, or in defence of his client. 3 *Bl. Com.* 396.

*Nudum pactum*, a bare naked agreement without any consideration (T. L. 518.) When an agreement in writing will be deemed a *NUDE CONTRACT*, and when not, see 2 *Bl. Com.* 446, *Cristian's note* (4.) *Fonb. Eq.* B. 1. c. 5. s. 1. note (a). 2 *H. & M.* 124. And, upon an agreement to pay the debt of another, the agreement itself must not only be in writing, but the consideration must be stated. 5 *East* 10. cited in 1 *Comy. on Cont.* 103.

*Nulla bona*, the return of the sheriff that the defendant has no goods within his bailiwick.

*Nul tiel record*, "there is no such record." See 3 *Bl. Com.* 331.

*Nunc pro tunc*, is when the court, under certain circumstances, permit a judgment to be entered at a subsequent term, now for then. When it will be granted, and when not, see *Tidd. Prac.* 438. 473-4. 846-7. 858.

## O.

*Office* (*officium*) signifies not only that function by virtue of which a man has some employment, but also an *inquisition*. Hence we often read of an *office found*; which is nothing but a finding by inquisition made *ex officio*. *Cow. Int.*

*Onus probandi*, "the burden of proof."

*Ouster le maine*, is properly the judgment given on a *monstrans de droit*, when the right is found, on a traverse, to be against the commonwealth. A writ then issues to the escheator that the commonwealth's hands be removed (*amoveas manum*) which is as much as if judgment were given that the party should have his lands again. T. L. 522.

*Outlawry*, is putting a man out of the protection of the law; and is now nothing more than a process to compel an appearance. See title "*Exigent*" and 3 *Bl. Com.* 283-4. A woman is said to be *waived*, and not *outlawed*. See T. L. 663.

*Oyer*, when either the plaintiff in his declaration, or the defendant in his plea, necessarily makes a *profert in curia*, of any deed, &c. the adverse party may demand *oyer* of it, that is to hear it read; and such demand must be complied with before he can be compelled to plead, or reply, as the case may be. If either party wish to take advantage of any defect in the deed, &c. it must be spread on the record by *oyer*. (See, on this subject, *Tidd. Prac.* 526.) The defendant may also have *oyer* of the writ in order to plead a variance between the writ and declaration (2 *Lill. Prac. Reg.* 336-7.) But this practice having been abused, the court of king's bench in England have, by a rule of court, disallowed it (see *Tidd. Prac.* 529. *Lowe's Plead.* 97.) This rule applies, however, only where it is specially adopted.

*Oyer and Terminer*, are courts constituted with power to *hear and determine* treasons, felonies, and misdemeanors. 4 *Bl. Com.* 269.

*Oyez*, "hear ye." A ceremony used by the cryer or sheriff in opening a court, vulgarly pronounced "O yes." 4 *Bl. Com.* 340. note.

## P.

*Pais*, "country." Thus trials *per pais*, "trials by the country" or jury; *in pais*, "in the country," not in the record.

*Paraphernalia* (from the Greek *Παρά, præter*, and *Φερί, dos*) signifies, in law, those goods which a wife claims *over and above* her dower, or jointure, after her husband's death; as furniture for her chamber, wearing apparel, jewels, &c. suitable to the estate of her husband, which are not to be put into the inventory of his estate. See *Toll. L. Ex.* 178.

*Parol*, "verbal," or a mere written contract, which is not a specialty, or under seal. See 2 *Bl. Com.* 446. *Christ. note* (4). 7 *Term Rep.* 350. note (a).

*Parol demurrer*, is a privilege allowed to an infant only, when sued as heir, on the obligation of his ancestor, &c.; in which case the proceedings shall be stayed till he come of age. But the parol shall not demur for infancy in a writ of dower (2 *Lill. Prac. Reg.* 354. *Tidd. Prac.* 589-80. 1033. 1121.) And, by the laws of Virginia, the parol shall not demurr, on account of infancy, in any case whatever. 1 *Rev. Code* 383.

*Pendente lite*, "while the suit is depending."

*Pernancy*, the receipt of profits. Thus, he who receives the profits of land, is called the *pernor of the profits*. T. L. 535.

*Per quod*, "by which," are words relating to any special damage.

*Plene administravit*, a plea by an executor or administrator, that he had *fully administered* the assets of his testator or intestate.

*Pluries*, a third or further writ which issues after an alias, commanding the sheriff, as often before he had been commanded, to take the defendant, &c. *sicut pluries præcipimus*. 3 *Bl. Com.* 283.

*Popular actions*, are those which are given to the informer, or the people at large, on a *penal statute*. 3 *Bl. Com.* 161.

*Posse Comitatus*, is the power which a sheriff has to take the *power of the county* to assist him in the execution of process. 1 *Bl. Com.* 343. *Wood's Inst.* 71.

*Postea*, is the entry of the verdict, nonsuit, &c. on the back of the record of *nisi prius*; which entry, from the Latin word it began with, is called the *postea*, "afterwards," &c. *Tidd. Prac.* 811.

*Præcipe*, is the term generally used for one of the original writs, as a *præcipe quod reddat*, for lands, debt, &c. (T. L. 546. 3 *Bl. Com.* 274.) It is also used as the note of instructions given by the plaintiff's attorney to the clerk. *Tidd. Prac.* 81.

*Procedendo*, is a writ directed to judges of an inferior court commanding them to *proceed* in a cause, which had been improperly removed from before them by some former writ. See *Tidd. Prac.* 346. 466.

*Prochein amy*, Fr. *Proximus amicus*, Lat. An infant may sue by his *next friend*, or by his guardian; but must defend by his guardian, who is assigned by the court for that purpose. F. N. B. 63. [27].

*Profert in curia*, is where the plaintiff declares upon a deed, or the defendant pleads a deed, he must do it by producing it in court (2 *Lill. Prac. Reg.* 470.) Unless the deed be lost, and then it may be pleaded without a *profert* (*Tidd. Prac.* 395.) So, it is usual for executors and administrators, in declarations, to make a *profert* of the letters testamentary, or of administration. *Tidd. Prac.* 1042.

*Puis darrien continuance*, is where new matter of defence has arisen since the last adjournment, which the defendant had it not in his power to plead before, the court will permit him to plead it in this form; but it will not be permitted if any continuance of the cause has intervened since the arising of this new matter. 3 *Bl. Com.* 517.

## Q.

*Quantum meruit*.....*Quantum valebant*, are counts on an implied assumpsit; the former properly signifying *as much as the plaintiff deserved to have*, for services, &c. rendered, and the latter, *as much as goods, &c. were worth*, where there was no stipulated price agreed on. See 3 *Bl. Com.* 162-3. *Tidd. Prac.* 3.

*Quarantine*, the term of forty days. It is generally applied to the time the widow is permitted to occupy the mansion house, before dower is assigned; or, to the time vessels coming from infected places must remain, before they can enter a port.

*Quare clausum fregit*. See *clausum fregit*.

*Qui tam* actions, are those on a penal statute, where part of the penalty is given to one, and the other to another. They are called *qui tam*, from some of the initial words, while the proceedings were in Latin; the suit being brought for a person, "*qui tam*," &c. *who as well for the commonwealth, &c. quam pro se ipso, &c. as for himself, &c. sues.* 3 *Bl. Com.* 162-3.

*Quoad hoc*, is often used in law pleadings and arguments to signify, *as to the thing named, the law is so and so, &c.*

*Quod cum*, in the commencement of a declaration while the proceedings were in Latin, has been generally translated "*for that whereas.*"

*Quorum*, is taken from a word anciently used in commissions of justices of the peace. Thus a commission issued to certain persons, authorising them to hold courts, &c. *of whom quorum*) such and such particular persons are always to be one. The persons thus specified were called justices of the *quorum*.

## R.

*Reddendum*, is a clause in a deed, whereby the grantor reserves some new thing to himself out of what he had before granted, as "*rendering rent,*" &c.

*Rejoinder*, is the defendant's answer to the plaintiff's replication, and

ought to follow and enforce the defendant's plea; otherwise it is a departure, which the law will not allow *Co. Lit.* 304. a.

*Repleader*, is where the pleadings have not brought the matter in issue which was to have been tried (*2 Lill. Prac. Reg.* 564.) Or, where issue is joined upon a fact totally immaterial or insufficient to determine the right; in which case the court, after verdict, will award a *repleader*, that is, that the parties plead again. *3 Bl. Com.* 395. *1 Burr.* 304.

*Replication*, is the exception or answer made to the defendant's plea. For if the plea made by the defendant doth not amount to an issue, or total contradiction of the declaration, but only evades it, the plaintiff may reply, either traversing the plea, that is, denying it, or allege new matter in contradiction to the defendant's plea (*3 Bl. Com.* 309.) But the replication must pursue the plaintiff's cause of action stated in his declaration. *Co. Lit.* 104 a.

*Respondens ouster*, is the judgment that the defendant answer over, in some better manner, after a dilatory plea overruled. *3 Bl. Com.* 303.

*Retraxit*, is where the party, in his proper person, comes into court, and saith he will not proceed further with his cause. This is a bar to the action forever. But a *retraxit* cannot be before a declaration is filed, for it would then be but a nonsuit. An attorney cannot enter a *retraxit*. *2 Lill. Prac. Reg.* 582.

## S.

*Scilicet* (sc.) the same as *videlicet* (viz.) "to wit," or "that is to say." See *Hob.* 171-2.

*Scire facias*, is a judicial writ founded on some matter of record, as a recognizance, judgment, &c. and issues to shew cause why execution should not be obtained. It also lies for other purposes, as to repeal letters patent, hear errors, &c. *Tidd. Prac.* 982. *T. L.* 606. *Cow. Int.*

*Se defendendo*, "in self defense."

*Simul cum*, "together with."

*Solvit ad diem*, "payment at the day."

*Solvit post diem*, "payment after the day." When it must be pleaded; see *Tidd. Prac.* 20.

*Son assault demeane*, is a justification in assault and battery, that it was the plaintiff's own original assault. *3 Bl. Com.* 120. 306.

*Stirpes*. Distribution or succession *per stirpes*, is where the estate goes in right of representation. *2 Bl. Com.* 577. 217.

*Subpœna*, is a process to cause witnesses to appear, and give testimony, or a defendant in chancery to answer a bill (*sub pœna*) under a penalty, for disobedience.

*Subpœna duces tecum*, is a process of *subpœna* with a special clause inserted in it, commanding the witness to bring with him, some deed or writing necessary to be produced at the trial. But if deeds, &c. be in the possession of the adverse party, notice should be given to produce them. See *Tidd. Prac.* 735-6.

*Summons and severance*, is where a writ of error is brought in the name of several parties, and some refuse to appear and assign errors, they must be summoned and severed; before the writ of error can proceed. *Tidd Prac.* 1054.

*Supersedeas*, is a writ that lies in a great many cases, and signifies in general a command to stay proceedings, on good cause shewn, which ought otherwise to proceed. *F. N. B.* 537.

## T.

*Tales de circumstantibus*, is the supplying the place of those jurors who are summoned on an inquest, and either make default of appearance, or are challenged, as not being indifferent. In this case, the sheriff is authorised to make up the number of *such* men there present as are *equal in reputation* to those empanelled. *T. L.* 628.

*Torts*, "wrongs."

*Tout temps first*, is a plea to an action, whereby after tender and refusal of a debt, the defendant acknowledges the debt, and pleads the tender; adding that he has *always been ready (tout temps first)* and still is ready (*uncore first*) to discharge it. *3 Bl. Com.* 303.

*Traverse*, is a denial, in pleading. But it is more particularly applied to a denial of a matter of fact found by office or inquisition. See *3 Bl. Com.* 260.

## U.

*Uncore first*, in a plea of tender, means that the defendant *is still ready to pay*.

*Unde nihil habet*, in a writ of dower, is where a widow claims dower of lands, *whereof she hath nothing*.

## V.

*Vadium mortuum*, "a dead pledge" or mortgage. *2 Bl. Com.* 157.

*Vadium vivum*, "a living pledge." *2 Bl. Com.* 157.

*Venditioni exponas*, is a writ of execution directed to the sheriff, commanding him to *expose to sale* goods taken in execution, and remaining in his hands unsold. *Cow. Int.*

*Venire facias*, is either a process by which a jury is awarded in a civil action, or that which issues in the nature of a *summons*, to cause the party to appear and answer an indictment or presentment. *3 Bl. Com.* 352. *4 Bl. Com.* 318.

*Ventre inficiendo*, a writ *de*, is a writ issued at the instance of the presumptive heir, to ascertain whether a widow be with child, who affects to be so, in order to produce a suppositious heir to the estate. *1 Bl. Com.* 456.

*Ventre ea mere*, an infant *in*, is a child in the mother's womb. *1 Bl. Com.* 130.

*Venue (vicinetum)* is the place or neighbourhood where the cause of action accrued, which must be stated in the pleadings, and is called laying the venue. In real actions the venue is local; in personal, it is transitory.



*Vicontiel*, are such writs as are triable in the county, before the sheriff. *Cow. Int.*

*Vinculo matrimonii*, divorce *a*, is a divorce from the bonds of matrimony. 3 *Bl. Com.* 94.

*Voir dire*, is where the party is examined upon oath to make true answer to such questions as the court shall demand of him. 3 *Bl. Com.* 332, 370.

## W.

*Waifs* (*bona waviata*) are goods stolen, and thrown away by the thief in his flight, for fear of being apprehended. 1 *Bl. Com.* 296.

*Waive* (*waviare*, law Lat.) is a term which signifies to forsake or relinquish. A woman is said to be *waived*, not *outlawed* as a man; because she is not sworn in the leet to the king, or to the law. In other words, she does not take the oath of allegiance. See T. L. 663.

*Withernam*. is a term applicable to the writ of replevin, and is used when the distrainer for rent removes the property distrained out of the county, and the sheriff returns that it is *eloigned*; thereupon a *capias in withernam* issues (*in vetito namio*) commanding him to take the goods of the distrainer, and keep them till the distress be forth coming. And goods thus taken in *withernam* cannot be replevied. 3 *Bl. Com.* 149.

AUTHORITIES CITED,  
AND  
ABBREVIATIONS USED IN THIS WORK.

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A.

*AMB.* Ambler's Reports.  
*Andr.* Andrew's Reports.  
*Ante.* Before.  
*Atk.* Atkins's Reports.

B.

*B.* Book.  
*B. L. D.* Burn's Law Dictionary.  
*B. R.* Banco Regis. In the court of king's bench.  
*B. R. H.* Banco Regis Hardwicke. Cases in the king's bench, in the time of Lord Hardwicke.  
*Bac. Abr.* Bacon's Abridgment (7th edit. by Gwillim.)  
*Barnes.* Barnes's Notes.  
*Binn.* Binny's Reports (Pennsylvania.)  
*Bl. Com.* Blackstone's Commentaries.  
*W. Bl. Rep.* William Blackstone's Reports.  
*H. Bl.* Henry Blackstone's Reports.  
*Bradb. Distr.* Bradby on Distresses (Riley's edit.)  
*Bridg.* Bridgman's Reports.  
*Bro. Ch. Ca.* Brown's Cases in Chancery.  
*Bro. P. C.* Brown's Parliamentary Cases.  
*Boss. & Pull.* Bosanquet and Fuller's Reports.  
*Bull. N. P.* Buller's Nisi Prius.  
*Bulstr.* Bulstrode's Reports.  
*Bunb.* Bunbury's Reports.  
*Burn. E. L.* Burn's Ecclesiastical Law.  
*Burr.* Burrow's Reports

C.

*C.* Chapter.  
*Ca. in Ch.* Cases in Chancery.  
*Ca. temp. Finch.* Cases in Chancery, in the time of sir Hancage Finch.  
*Ca. temp. Talb.* Cases in Chancery, in the time of lord Talbot.

- Caines.* Caine's (New York) Term Reports.  
*Call.* Call's Reports (Virginia.)  
*Carth.* Carthew's Reports.  
*C. B.* (Bancus Communis) Common Bench, or court of common pleas.  
*Ch. Decis.* Decisions of Cases, in Virginia, by the High Court of Chancery (by George Wythe, late judge of that court.)  
*Christ. Notes.* Christian's Notes to Blackstone's Commentaries.  
*Co. Coke's Reports.* The references are always to the *parts* and not the *volumes*.  
*Co. Lit.* Coke on Littleton.  
*Comb.* Comberbach's Reports.  
*Comy. on Cont.* Comyn on Contracts (Riley's edit.)  
*Comy. Dig.* Comyns's Digest (fifth edit. by Rose.)  
*Cow. Int.* Cowell's Interpreter.  
*Cowp.* Cowper's Reports.  
*Cranch.* Cranch's Reports.  
*Cr. Cir. Assist.* Crown Circuit Assistant.  
*Cr. Cir. Comp.* Crown Circuit Companion.  
*Cro. Eliz.* Croke's Reports, in the reign of Queen Elizabeth.  
*Cro. Jac.* Croke's Reports in the reign of James the First.  
*Cro. Car.* Croke's Reports in the reign of Charles the First.  
*Cruise Dig.* Cruise's Digest of the Law, on real property.

## D.

- Dall.* Dallas's Reports (Pennsylvania.)  
*Day's Ca. Err.* Day's Cases in Error (Connecticut.)  
*Dalt.* Dalton's Justice.  
*Dyer.* Dyer's Reports.  
*Doug.* Douglas's Reports.

## E.

- East.* East's Reports.  
*Ea. Cr. L.* East's Crown Law.  
*'Esp. N. P.* Espinasse's Nisi Prius.  
*'Esp. Rep.* Espinasse's Reports (Day's edit.)

## F.

- F. N. B.* Fitzherbert's Natura Brevium.  
*Fearne Cont. Rem.* Fearne's Contingent Remainders.  
*Fearne Ex. Dev.* Fearne's Executory Devises.  
*Fitzg.* Fitzgibbon's Reports.  
*Fost.* Foster's Crown Law.  
*Forrest.* Forrester's Reports (the same as cases temp. Talbot.)

## G.

- Gilb. Dev.* Gilbert's Devises.  
*Gilb. Distr.* Gilbert's Distresses.

*Gilb. Ev.* Gilbert's Law of Evidence (seventh edit. by Sedgwick.)  
*Gilb. Rents.* Gilbert on Rents.  
*Godolph. O. L.* Godolphin's Orphan's Legacy.  
*Godolph. Rep. Can.* Godolphin's Repertorium Canonicum.  
*Goldsb.* Goldsborough's Reports.

H.

*H. & M.* Hening and Munford's Reports (Virginia.)  
*Hale.* Hale's History of the Pleas of the Crown.  
*Hal. C. L.* Hale's History of the Common Law.  
*Hardr.* Hardres's Reports.  
*Harr. Ch. Pr.* Harrison's Chancery Practice (Farrand's edit.)  
*Haw.* Hawkins's Pleas of the Crown. The references are generally to the book, chapter and section.  
*Hob.* Hobart's Reports.

I.

1 *Inst.* Coke on Littleton.  
 2 *Inst.* The second part of Coke's Institutes  
 3 *Inst.* The third part of Coke's Institutes.  
 4 *Inst.* The fourth part of Coke's Institutes.

J.

*Jenk.* Jenkins's Centuries.  
*Johns.* Johnson's Reports (New York.)  
 1 *Jones.* Sir William Jones's Reports.  
 2 *Jones.* Sir Thomas Jones's Reports.

K.

*Keil.* Keilways Reports.  
*Kely.* Kelyng's Reports.  
*Kirb.* Kirby's Reports (Connecticut.)  
*Kyd Aw.* Kyd on Awards.

L.

*Latch.* Latch's Reports.  
*Lawes Plead.* Lawes on Pleading.  
*Leach.* Leach's Cases in Crown Law.  
*Leon.* Leonard's Reports.  
*Lev. Ent.* Levinz's Entries.  
*Lev.* Levinz's Reports.  
*Lill. Ent.* Lilly's Entries.  
*Lill. Prac. Reg.* Lilly's Practical Register  
*Lit. §.* Littleton's Tenures.  
*Lofft.* Lofft's Reports.  
*Ld. Raym.* Lord Raymond's Reports.  
*Lutw.* Lutwyche's Reports.

## M.

*Mac Nal. Ev.* Mac Nally's Evidence, on Pleas of the Crown.  
*March.* March's Reports.  
*Mass. T. R.* Massachusetts Term Reports.  
*Mod. Ca.* Modern Cases, in the time of Holt.  
*Mod.* Modern Reports.  
*Mo.* Moore's Reports.

## N.

*New. Rep.* New Reports, by Bosanquet and Puller.  
*N. Y. Term Rep.* New York Term Reports, by Caines.

## O.

*Ons. N. P.* Onslow's Nisi Prius.  
*Owen.* Owen's Reports.

## P.

*Palm.* Palmer's Reports.  
*Peake. Ca. N. P.* Peake's Cases at Nisi Prius.  
*Peake. Ev.* Peake's Law of Evidence.  
*Penningt.* Pennington's Reports (New Jersey.)  
*Perk.* Perkins's Laws of England.  
*P. Will.* Peere William's Reports.  
*Plowd.* Plowden's Commentaries, or Reports.  
*Poph.* Popham's Reports.  
*Post.* After.  
*Powell Cont.* Powell on Contracts.  
*Powell Dev.* Powell on Devises.  
*Powell Mortg.* Powell on Mortgages.  
*Preced. in Ch.* Precedents in Chancery.

## R.

*Ld. Raym.* Lord Raymond's Reports.  
*T. Raym.* Thomas Raymond's Reports.  
*Rast. Ent.* Rastell's Entries.  
*Ridgw.* Ridgway's Reports.  
*Reg. Brev.* Registrum Brevium, or the Register of Writs.  
*Rep. in Ch.* Reports in Chancery.  
*1 Rev. Code.* The first volume of the Revised Code of Virginia Laws,  
published in 1803, by Pleasants and Pace.  
*2 Rev. Code.* The second volume of the Revised Code of Virginia  
Laws, published in 1808, by Pleasants.  
*Rol.* Roll's Abridgement.

## S.

*S. Section.*  
*S. C.* Same Case.



*S. P.* Same Point.  
*Salk.* Salkeld's Reports.  
*Sand. U. & T.* Sunders on Uses and Trusts.  
*Saund.* Saunders's Reports (by Williams.)  
*Say.* Sayer's Reports.  
*Scho & Lef.* Schoales and Lefroy's Reports.  
*Scob. Acts.* Scobell's Acts of Parliament during the usurpation.  
*Selw. N. P.* Selwyn's Nisi Prius.  
*Semb.* It seems.  
*Show.* Shower's Reports.  
*Sid.* Siderfin's Reports.  
*Skinn.* Skinner's Reports.  
*Spell. Gloss.* Spelman's Glossary.  
*Stat. at Large.* Statutes at Large of Virginia (by Hening.)  
*Stor. Plead.* Storey's Pleadings.  
*Str.* Strange's Reports.  
*Style.* Style's Reports.  
*Sug. L. V.* Sugden's Law of Vendor's.  
*Sug. Pow.* Sugden on Powers.  
*Sum.* Hale's Summary of the Pleas of the Crown.

T.

*T. L.* Terms of the Law.  
*Tayl.* Taylor's Reports (North Carolina.)  
*Term. Rep.* Term Reports (by Durnford and East.)  
*Tidd. Prac.* Tidd's Practice (Riley's edit.)  
*Tidd. Prac. F.* Tidd's Appendix, or Practical Forms.  
*Toll. L. Ex.* Toller's Law of Executors.  
*Tyng.* Massachusetts Term Reports (by Tyng.)

V.

*Vaugh.* Vaughan's Reports.  
*Vent.* Ventris's Reports.  
*Vern.* Vernon's Reports.  
*Ves.* Vesey's Reports.  
*Ves. jr.* Vesey, junior's, Reports.  
*Vin. Abr.* Viner's Abridgment.  
*Vin. Suppl.* Supplement to Viner's Abridgment.

W.

*Wash.* Washington's Reports (Virginia.)  
*Wats. L. P.* Watson's Law of Partnership (Farrand's edit.)  
*Went. Plead.* Wentworth's System of Pleading.  
*Willes.* Willes's Reports.  
*Wils.* Wilson's Reports.  
*Wood.* Wood's Institutes.

Y.

*Yelv.* Yelverton's Reports.



THE  
NEW VIRGINIA JUSTICE, &c.

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ACCESSORY.

*I. Of accessories in general. II. Of accessories before the fact. III. Of accessories after the fact. IV. How they are to be proceeded against. V. Warrants, Commitments, and Indictments against accessories.*

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I. OF ACCESSORIES IN GENERAL.

1. *AN Accessory is, he who is not the chief actor in the offence, nor present at its performance, but is someway concerned therein, either before or after the fact committed.* 4 Bl. Com. 35.

2. In high treason there are no accessories, but all are principals: the same acts that make a man accessory in felony making him a principal in high treason, upon account of the heinousness of the crime. *Ibid.*

3. In petit treason, murder, and felonies, with or without benefit of clergy, there may be accessories: except only in those offences, which by judgment of law are sudden and unpremeditated, as man slaughter and the like; which therefore cannot have any accessories *before* the fact. 4 Bl. Com. 36.

4. In petit larceny, and in all crimes under the degree of felony, there are no accessories either *before* or *after* the fact; but all persons concerned therein, if guilty at all, are principals: the same rule holding with regard to the highest and lowest offences, though upon different reasons. In *treason* all are principals,\* *on account of the heinousness of the crime*; in *trespass* all are principals, because the law, *which doth not regard trifles*, does not descend to distinguish the different shades of guilt in petty misdemeanors. *Ibid.*

\* This must be understood of treason under the laws of England. The constitution of the United States (art. 3. sec. 3.) has declared that treason shall consist *only* in levying war against the United States, or in adhering to their enemies within the same, giving them aid and comfort. See 4 *Tuck. Bl. Appendix*, note B. p. 41.

5. It is a maxim, *that an accessory follows the nature of his principal*: and therefore an accessory cannot be guilty of a higher crime than his principal; being only punished, as a partaker of his guilt. So that if a servant instigates a stranger to kill his master, this being murder in a stranger as principal, of course the servant is accessory only to the crime of murder; though, had he been present and assisting, he would have been guilty as principal of petty treason, and the stranger of murder. *Ibid.*

6. Lord Coke generally observes, that when any offence is felony, either by the common law or by statute, all accessories, both before and after the fact, are incidentally included. 3 *Inst.* 59, 73.

7. But yet the special penning of the statute, creating a felony, may greatly diversify the offence of accessory or principal. See 1 *Hale*. 614. and *Haw.* b. 2. c. 29.

## II. OF ACCESSORIES BEFORE THE FACT.

*An accessory before the fact committed is he, w<sup>o</sup>, being absent at the time of the crime committed, doth yet procure, counsel, command, or abet another to commit a crime.* 4 *Bl. Com.* 36.

*Being absent at the time of the crime committed.* Absence is necessary to make him an accessory; for if such procuror, or the like, be present, he is guilty of the crime as principal. 4 *Bl. Com.* 36.

So also if divers come to commit an unlawful act, and be present at the time of the felony committed, though one of them only doth it, they are *all* principals. *Sum.* 215.

So if one present move the other to strike; or if one present did nothing, but yet came to assist the party, if needful; or if one hold the party while the felon strikes him; or if one present delivers his weapon to the other that strikes: for they are *present*, aiding, abetting, or comforting. *Ibid.* 216.

So if several persons set out together, or in small parties, upon one common design, be it murder or other felony, or for any other purpose unlawful in itself, and each taketh the part assigned him; some to commit the fact, others to watch at proper distances and stations to prevent a surprise, or to favour (if need be) the escape of those who are more immediately engaged: they are all, provided the fact be committed, in the eye of the law, present at it. For it was made a common cause with them; each man operated in his station, at one and the same instant, towards one and the same common end; and the part each man took tended to give countenance, encouragement and protection to the whole gang, and to ensure the success of their common enterprise. *Post.* 350.

But if one came casually, not of the confederacy, though he hindered not the felony, he is neither principal nor accessory, although he apprehended not the felon; but for his negligence he is punishable, by fine and imprisonment. *Hale's Pl.* 216. *Haw.* B. 2. c. 29. s. 10.

Also in some cases even a person *absent* may be principal; as he that puts poison into any thing to poison another, and leaves it, though

not present when it is taken : and so it seems are all that are present when the poison is so infused, and consenting thereunto. *Sum.* 216.

*Procure, counsel, command, or abet.* In the construction of these words, some distinctions are necessary to be observed : as,

(1) *When the principal doth not accomplish the fact altogether in the same sort, as it was beforehand agreed between him and the accessory.* And therefore if one commands another to lay hold upon a third person, and he lays hold upon him and robs him, the person commanding is not accessory to the robbery ; for his command might have been performed without any robbery. *4 Bl. Com.* 37.

But if the felony committed be the same in substance with that which is commanded, and only varying in some circumstantial matters, as if, upon a command to poison *Titius*, he is stabbed or shot, and dies, the commander is still accessory to the murder, for the substance of the thing commanded was the death of *Titius*, and the manner of its execution is a mere collateral circumstance. *Ibid.*

So, if the command had been to beat him, and the party commanded doth kill him, or beat him so that he dieth thereof ; the person commanding shall be accessory to the murder : for it is a hazard in beating a man, that he may die thereof. *Dalt. c.* 161.

(2) *It is likewise a rule, that he who in any wise commands or counsels another to commit an unlawful act, is accessory to all that ensues upon that unlawful act ; but is not accessory to any act distinct from the other.* As in the case last above mentioned, where A commands B to beat C, and he beats him so that he dies ; B is guilty of murder as principal, and A as accessory. But if A commands B to burn C's house, and he in so doing commits a robbery ; now A, though accessory to the burning, is not accessory to the robbery, for that is a thing of a distinct and unsequential nature. *4 Bl. Com.* 37.

So, if one command another to steal a horse and he stealeth an ox ; or to rob a man by the high way of his money, and he robs him in his house of his plate ; or to burn such a one's house, and he burneth the house of another ; these are other acts and felonies than he commanded to be done, and therefore he shall not be adjudged accessory to them. *Dalt. c.* 161.

(3) It seems to be generally agreed, *that he who barely conceals a felony which he knows to be intended is guilty only of a misprision of felony, and shall not be adjudged an accessory.* *Haw. B. 2. c.* 29. s. 23.

(4) It is settled that whosoever procureth a felony to be committed, though it be by the intervention of a third person, is an accessory before the fact. *4 Bl. Com.* 37.

(5) But if a man counsels or commands another to kill a person, and before he hath killed him, he who counselled or commanded it repents, and countermands it, charging him not to kill him, and yet after he doth kill him ; here such person countermanding shall not be adjudged accessory to the murder : for generally the law adjudgeth no man accessory to a felony before the fact, but such as continue in that mind at the time that the felony is done and executed. *Dalt. c.* 161.

(6) Yet if a person advise a woman to kill her child as soon as it shall be born, and she kill it in pursuance of such advice ; he is an



cessory to the murder, though at the time of the advice, the child being not born, no murder could be committed of it : for the influence of the felonious advice continuing till the child was born, makes the adviser as much a felon, as if he had given his advice after the birth. *Haw. B. 2. c. 29. s. 18.*

### III. OF ACCESSORIES AFTER THE FACT.

*An accessory after the fact may be, where a person, knowing a felony to have been committed, receives, relieves, comforts, or assists the felon.* 4 *Bl. Com.* 37.

*Knowing a felony to have been committed* It is necessary that the receiver have notice of the felony, either express or implied ; and the indictment against an accessory after the fact must charge, that he *know* that the person received by him had committed the principal felony. *Haw. B. 2. c. 29. s. 32.*

*A felony.* This holds place only in *felonies*, and in those felonies, where, by the law, judgment of death regularly ought to ensue ; and therefore not in petit larceny (1 *Hale* 618.) So, neither in trespass, or other inferior crime. *Haw. B. 2. c. 29. s. 4.*

*Relieves, comforts, or assists the felon.*

(1) Generally, any assistance whatsoever given to one known to be a felon, in order to hinder his being apprehended, or tried, or suffering the punishment to which he is condemned, is sufficient to bring a man within the description, and make him accessory to the felony ; as where one assists him with a horse to ride away with, or with money or victuals to support him in his escape. *Haw. B. 2. c. 29. s. 26.*

(2) But if a man knows that a person hath committed a felony, but doth not discover it, this doth not make him an accessory *after*, but it is a misprision of felony, for which he may be indicted, and upon his conviction fined and imprisoned. 1 *Hale* 618.

(3) Also if a man sees another commit a felony, but consents not, nor yet takes care to apprehend him ; this is a neglect punishable by fine and imprisonment, but it doth not make him an accessory *after*. *Ibid.*

(4) In like manner, if one commit a felony, and come to a person's house before he be arrested, and such person suffer him to escape without arrest, knowing him to have committed a felony, this doth not make him accessory ; but if he take money of the felon to suffer him to escape, this makes him an accessory : and so it is if he use any stratagem, by which the pursuers of the felon are deceived, and he hath an opportunity to escape, this makes him an accessory ; for here is not a bare omission, but an act done by him to facilitate the felon's escape. *Ibid.* 619.

(5) Also it seems to be settled at this day, that whosoever rescues a felon from an arrest for the felony, or voluntarily suffers him to escape, is an accessory to the felony. *Haw. B. 2. c. 29. s. 27.*

(6) But to relieve a felon in jail with clothes, or other necessities, is no offence : for the crime imputable to this species of accessory is

the hindrance of public justice, by assisting the felon to escape the vengeance of the law. 4 *Bl. Com.* 38.

(7) The same observations will apply to the case of a person bailed on suspicion of felony. *Ibid.*

(8) If a person speaks or writes in favour of a felon, or advises witnesses not to appear, he is not an accessory to the felony; but the last is a high contempt. 1 *Hale* 621.

(9) But to convey instruments to a felon in jail to facilitate his escape, or to bribe the jailor to let him escape, makes the party an accessory. *Ibid.*

(10) A man may be accessory to an accessory, by the receiving of him, knowing him to be an accessory to a felony. *Ibid.* 622.

(11) If a man hath goods stolen, and he receives his goods again, simply, without any contract to favour the felon in his prosecution, this is lawful; but if he receive them upon agreement not to prosecute, or to prosecute faintly, this is theftbote, punishable by imprisonment and ransom, but yet it makes him not an accessory; but if he take money of him to favour him, whereby he escapes, this makes him an accessory. 1 *Hale* 619.

(12) The felony must be complete at the time of the assistance given, else it makes not the assistant an accessory. As, if one wounds another mortally, and after the wound given, but before death ensues, a person assists or receives the delinquent, this does not make him accessory to the homicide; for till death ensues there is no felony committed. 4 *Bl. Com.* 38.

(13) But so strict is the law where a felony is actually complete, in order to do effectual justice, that the nearest relations are not suffered to aid or receive one another. If the parent assists his child, or the child his parent, if the brother receives the brother, the master his servant, or the servant his master, or even if the husband relieves his wife, who have any of them committed a felony, the receivers become accessories after the fact (*Ibid.*) But a feme-covert cannot become an accessory by the receipt and concealment of her husband; for she is presumed to act under his coercion, and therefore she is not bound, neither ought she to discover her lord. *Ibid.* 39.

(14) But if the wife alone, the husband being ignorant of it, do receive any other person, being a felon, the wife is accessory, and not the husband. 1 *Hale* 621.

(15) But if the husband and wife both receive a felon knowingly, it shall be adjudged only the act of the husband, and the wife shall be acquitted. *Ibid.*

#### IV. HOW THEY ARE TO BE PROCEEDED AGAINST.

Anciently the accessory could not be tried, unless the principal were attainted; (1 *Hale* 625) but this is remedied by statute.

1. If the principal be convicted, or stand mute, or peremptorily challenge more than twenty of his jury, the accessory may be tried, as if the principal had been attainted; and this, though the principal be admitted to his clergy, pardoned, or otherwise delivered before

attainder; and such accessory, if *he* be convicted, stand mute, or challenge as aforesaid, shall suffer as if the principal had been attained. 1 *Rev. Code* 206. (From 1 *Ann. stat.* 2. c. 9. s. 1.)

2. Persons buying or receiving stolen goods, knowing them to be stolen, may be prosecuted and punished, as for a misdemeanor, to be punished by fine and imprisonment, though the principal be not before convicted, which shall exempt them from punishment as accessory, if the principal be afterwards convicted *Ibid.* (*Ibid.*) And buying the goods at an under value is presumptive evidence that they were known to have been stolen. 1 *Hale* 619.

3. So, to buy or receive a stolen horse, knowing him to be stolen, or to harbour or conceal a horse-stealer, knowing him to be such, makes the offender an accessory to the felony, and formerly subjected him to the punishment of death; (*Rev. Code*, vol. i. p. 179) but now to confinement in the penitentiary, for not less than one, nor more than ten years. *Ibid.* p. 402.

But if such principal cannot be taken and convicted, every such person buying or receiving any horses stolen, knowing them to be so, may be prosecuted as for a misdemeanor, to be punished by fine and imprisonment, or other corporal punishment, although the principal be not before convicted; which shall exempt the offender from punishment as accessory, if the principal be afterwards convicted. *Ibid.* p. 179.

4. If a person be stricken or poisoned in one county, and die in another, the offender shall be tried by the court where the stroke was given, or the poison administered. *Ibid.* p. 104.

5. An accessory to a murder or felony shall be examined and tried in the court of the county, in which he became accessory. *Ibid.*

6. If any be accused as principal, those accused as accessory shall be taken also, and kept in custody, till the principal be attained or delivered. *Ibid.* p. 126.

7. A slave convicted and executed shall not be paid for, if, in the perpetration of the crime, his owner was either principal or accessory. *Rev. Code*, vol. ii. p. 97.

8. The accessory may be indicted in the same indictment with the principal, and that is the best and most usual way; but he may be indicted in another indictment, but then such indictment must contain the certainty and kind of the principal felony. 1 *Hale* 623.

9. The accessory may be put to answer before the principal hath appeared; but his plea cannot be tried before such appearance, unless he desires it himself. *Haw. B.* 2. c. 29. s. 45.

But it seems necessary in such case to respite judgment until the principal be convicted; for if the principal be after acquitted, that conviction of the accessory is annulled, and no judgment ought to be given against him: but if he be acquitted of the accessory, that acquittal is good, and he shall be discharged. 1 *Hale* 623-4.

10. If the principal and accessory appear together, and the principal plead the general issue, the accessory shall be put to plead also; and if he likewise plead the general issue, both may be tried by one inquest; but the principal must be first convicted, and the jury shall

## ACCESSORY.

be charged, that if they find the principal not guilty, they shall find the accessory not guilty also. But if the principal plead a plea in bar or to the writ, the accessory shall not be driven to answer, until the plea be determined: for if it be found for the principal, the accessory is discharged; if against the principal, yet he shall after plead over the felony, and may be acquitted. *Haw. B. 2. c. 29. s. 47. 1 Hale 62.*

11. Where a person is charged as accessory to more than one principal, there are strong objections to trying him on the conviction of one before all of them have appeared; because thereby he may be subjected to the hardship and hazard of two trials for his life for the same offence, which is contrary to the general course of the law. *Haw. B. 2. c. 29. s. 46.*

If a man be indicted as accessory to two or more, and the jury find him accessory to one, it is a good verdict, and judgment may pass upon him. And therefore the court, in their discretion, may arraign him as accessory to such of the principals who are convicted; and if he be found guilty as accessory to them, or *any of them*, judgment shall pass upon him. But, on the other hand, if he be acquitted, that acquittal will not discharge him as accessory to the others. And when they come in and are convicted and attainted, or if judgment of outlawry passeth against them, he may be arraigned *de novo* as accessory likewise to them. Although it is the safer course, according to *1 Hale*, to respite the arraignment of the accessory, until all appear and are outlawed. *Fost. 361.*

12. If the principal be erroneously attainted, the accessory shall not be put to answer, and shall not take advantage of the error in that attainer; but the principal reversing the attainder, reverseth the attainder of the accessory. *1 Hale 625.*

13. If the principal and accessory are joined in one indictment and tried together, which seems to be the most eligible course where both are amenable, the accessory may enter into the full defence of the principal, and avail himself of every matter of fact and every point of law tending to his acquittal. For the accessory is in this case to be considered as a *partner in the suit*, and this sort of defence necessary and directly tendeth to his own acquittal. *Fost. 365.*

14. When the accessory is brought to trial *after* the conviction of the principal, it is not necessary to enter into the evidence on which the conviction was founded. Nor doth the indictment aver that the principal was in fact guilty. It is sufficient if it reciteth, with proper certainty, the record of the conviction. This is evidence against the accessory sufficient to put him upon his defence. For it is founded on a legal presumption, that every thing in the former proceeding was rightly and properly transacted. But a presumption of this kind must give way to facts manifestly and clearly proved. As against the accessory, the conviction of the principal will not be conclusive; it is a *him a thing done among others.* *Ibid.*

And therefore if it shall come out in evidence upon the trial of the accessory, as it some times hath, and frequently may, that the offence of which the principal was convicted did not amount to felony in him

or not to that species of felony with which he was charged, the accessory may avail himself of this, and ought to be acquitted. *Ibid.*

15 And as in point of *law*, so also in point of *fact*, if it shall manifestly appear in the course of the accessory's trial, that the principal was innocent, common justice seemeth to require that the accessory should be acquitted. As, suppose a man is convicted upon circumstantial evidence, strong as that sort of evidence can be, of murder; another is afterwards indicted as accessory to this murder; and it cometh out upon the trial, by incontestible evidence, that the person who was supposed to be murdered is still living; in this case surely the person indicted as accessory to this murder shall be acquitted. Or suppose the person to have been in fact murdered, and that it should come out in evidence, *to the satisfaction of the court and jury*, that the witnesses against the principal were mistaken in his person, that the person convicted as principal was not nor could possibly have been present at the murder. *Ibid.* 367-8.

16. If one be indicted as principal, and another as accessory, and both be acquitted, yet the person indicted as accessory may be indicted as principal, and the former acquittal as accessory is no bar. 1 *Hale* 625.

17. But if a person be indicted as principal, and acquitted, he shall not be indicted as accessory *before*; and if he be, he may plead his former acquittal in bar, for it is in substance the same offence. 1 *Hale* 626.

But, on this point, sir *Michael Foster* expresses strong doubts. See *Fost.* 362.

18. So, if a man be indicted as principal, and acquitted, he may be indicted as accessory *after*, for they are offences of several natures. 1 *Hale* 626.

19. And so it is if he be indicted as accessory *before*, and acquitted; yet for the same reason he may be indicted as accessory *after*. *Ibid.*

NOTE....For the punishment of accessories, see title "PENITENTIARY," and the respective heads under which the crimes are classed.

In the act "to amend the penal laws of this commonwealth, passed the fifteenth of December, 1796 (1 *Rev. Code* 355) the punishment of accessories *before* the fact was in general prescribed, but not of accessories *after* the fact: they consequently either fall within the provisions of the thirteenth section of that act, which declares that *every person convicted of any felony heretofore deemed CLERGYABLE*, shall undergo an imprisonment in the penitentiary for any time not less than *six months*, and not more than *two years*; or they come within the purview of the act of the twenty-fifth of January, 1800 (1 *Rev. Code* 402) which provides, that *if any free person shall be convicted (either as principal or accessory) of any felony or offence whatsoever, not already provided for, by the first mentioned act, the punishment whereof, by the laws in force at and before the commencement of that act, may amount to death, WITHOUT THE BENEFIT OF CLERGY*, such offender shall be imprisoned in the penitentiary for not less than *one*, nor more than *ten* years.

## V. WARRANTS, COMMITMENTS, AND INDICTMENTS AGAINST ACCESSORIES.

### (A) *Warrant against an accessory before the fact.*

County, to wit:

Whereas A. I. of                      hath this day made information, on oath  
(or solemnly affirmed, as the case may be) before me J. P. a justice of the  
peace for the county aforesaid, that on the night of the                      of this  
present month, the dwelling house of him the said A. I. at the county  
aforesaid, was feloniously and burglariously broken open and entered,  
and                      of the value of                      (*describe the property and its  
value*) of the goods and chattels of him the said A. I. were feloniously  
and burglariously stolen, taken and carried away from thence; and  
that he hath just cause to suspect, and doth suspect, that O. P. of  
did commit the said felony and burglary, and that O. A.  
of                      did procure, counsel, command and abet the said O. P. to  
commit the same: These are therefore to command you, that imme-  
diately upon sight hereof, you apprehend the said O. A. and bring  
him before me, or some other justice of the peace for the county afore-  
said, to answer the said charge, and further to be dealt with according  
to law. Given under my hand and seal, at the the county of  
aforesaid, this                      day of                      in the year  
To                      constable.                      J. P. [seal]

NOTE....The above form may easily be adapted to any other felony;  
taking care to describe the offence, with sufficient certainty, and to  
state that the accessory procured, counselled, commanded, and abet-  
ted it.

### (B) *Warrant against an accessory after the fact.*

County, to wit:

Whereas A. I. of                      hath this day made information, on oath  
(or solemnly affirmed, as the case may be) before me J. P. a justice of the  
peace for the county aforesaid, that on the night of the                      of this  
present month, the dwelling house of him the said A. I. at the county  
aforesaid, was feloniously and burglariously broken open and entered,  
and                      of the value of                      (*describe the property and its  
value*) of the goods and chattels of him the said A. I. were feloniously  
and burglariously stolen, taken and carried away from thence; and  
that he hath just cause to suspect, and doth suspect, that O. P. of  
did commit the said felony and burglary, and that O. R.  
of                      knowing the said felony and burglary to have been com-  
mitted, did receive, relieve, comfort and assist the said O. P. to com-  
mit the same: These are therefore to command you, that immedi-  
ately upon sight hereof, you apprehend the said O. A. and bring him  
before me, or some other justice of the peace for the county aforesaid,  
to answer the said charge, and further to be dealt with according to



## ACCESSORY.

law. Given under my hand and seal, at the county of                      afore-  
said, this                      day of                      in the year  
To                      constable.                      J. P. [seal]

NOTE....If the offence be committed in the *day* time, omit what relates to the *night* and to *burglary*.

*(C) Warrant against a receiver of stolen goods.*

County, to wit :

Whereas A. I. of                      hath this day made oath before me, J. P.  
a justice, &c. that on the                      day of                      at the county afore-  
said, the following goods and chattels were feloniously taken and stolen  
from the said A. I. by some person or persons unknown, to wit : (*here*  
*describe the goods, with the value respectively*) and that he hath good  
grounds to suspect, and doth suspect, that O. R. of                      did re-  
ceive (*or buy, as the case may be*) the said goods and chattels, from the  
said felon or felons, knowing them to have been stolen : These are  
therefore to command you, that immediately upon sight hereof, you  
apprehend the said O. R. and bring him before me, or some other  
justice of the peace for the county aforesaid, to answer the said charge,  
and further to be dealt with according to law. Given under my hand  
and seal, at the county of                      aforesaid, this                      day of  
in the year  
To                      constable.                      J. P. [seal]

NOTE....The last form may be varied so as to suit the case of buying  
or receiving a stolen horse, knowing him to be stolen ; or of har-  
bouring or concealing a horse stolen, knowing him to be such.

*(D) Warrant for misprision of felony, in concealing it.*

County, to wit :

Whereas information hath been made to me, J. P. a justice of the  
peace for the county aforesaid, by the oath of A. I. that O. M. of  
labourer, well knowing that a felony and burglary had been  
committed by B. F. of                      aforesaid, in the night of                      the  
day of                      last past, in breaking and entering the meat  
house of C. S. in the said county, with intent to commit a felony, did  
conceal his knowledge of the said felony and burglary, contrary to  
law, and to the evil example of all others in like cases offending :  
These are therefore to command you, that immediately upon sight  
hereof, you apprehend the said O. A. and bring him before me, or  
some other justice of the peace for the county aforesaid, to answer the  
said charge, and further to be dealt with according to law. Given  
under my hand and seal, at the county of                      aforesaid, this  
day of                      in the year  
To                      constable.                      J. P. [seal]

*(E) Commitment of an accessory, before the fact.*

To the keeper of the jail of                      county.  
I herewith send you the body of O. A. of                      labourer, who is  
charged upon the oath (*or solemn affirmation*) of A. I. of                      with

procuring, counselling, commanding and abetting, one O. P. to commit a felony and burglary, in the night of the      day of      last past, by breaking and entering the mansion house of the said A. I. at the county aforesaid, and feloniously and burglariously taking from thence (*here describe the property, and the value respectively.*) These are therefore to require you, to receive into your jail and custody, the said O. A. and him safely keep, till he be delivered by due course of law. Given under my hand and seal at      this day of      in the year      J. P. [seal]

(F) *Commitment against an accessory after the fact.*

To the keeper of the jail of      county.  
I herewith send you the body of O. A. of      labourer, who is charged upon the oath (*or solemn affirmation*) of A. I. of      with receiving, relieving, comforting and assisting, one O. P. well knowing that a felony had been committed by the said O. P. in feloniously taking and carrying away from C. S. of      on the      day of      last past, the following goods and chattels (*here describe the property with their value.*) These are therefore to require you to receive into your jail and custody, the said O. A. and him safely keep till he be delivered by due course of law. Given under my hand and seal, at      this      day of      in the year      J. P. [seal]

NOTE....If the offence be bailable, which may be seen under title "BAIL," then, instead of committing the offender, the magistrate should take his *recognizance*, to appear at the court of *Examination* (a tribunal peculiar to the laws of Virginia) the forms of which *recognizance*, may be found under titles "BAIL" and "RECOGNIZANCE."

(G) *Indictment of an accessory before the fact, for murder.*

to wit:

The jurors for the      aforesaid, upon their oath present, that whereas A. O. late of      yeoman, and B. O. late of      labourer, not having God before their eyes, but being seduced by the instigation of the devil, on the      \* day of      in the year      at the parish of      † in the county aforesaid, † with force and arms, &c. || feloniously and of their aforethought malice, in and upon one C. D. then and there in the peace of God, and of the said

\* The date should be written in words at length.

† No indictment shall be quashed for the omission of the name of any parish, town, ville, or hamlet, within any county. 1 Rev. Code 105.

‡ While the district court system was in operation, it was usual, after the word "aforesaid," to say "within the jurisdiction of the district court aforesaid;" and to lay the venue in that manner through the indictment. But it may well be doubted whether it was necessary. See the case of *Turberville v. Long*, reported in 3 Ben. & Munf.

|| In any inquisition or indictment, the words "force and arms," or any particular words descriptive of any particular kind of force and arms, shall not of necessity be put or comprised. 1 Rev. Code 105.

commonwealth being, made an assault and affray, and the aforesaid A. O. a certain gun called a pistol, of the value of then and there charged with gunpowder, and a leaden bullet, which gun the said A. O. in his right hand then and there had and held, in and upon the aforesaid C. D. then and there feloniously, voluntarily and of his malice aforethought, did shoot off and discharge; and the aforesaid A. O. with the leaden bullet aforesaid, from the gun aforesaid then and there sent out, the aforesaid C. D. in and upon the left part of the breast of him the said C. D. then and there feloniously struck, giving to the said C. D. then and there with the leaden bullet aforesaid, near the left pap of him the said C. D. one mortal wound of the breadth of half an inch, and depth of five inches, of which mortal wound the aforesaid C. D. at the county of aforesaid, in the parish aforesaid, instantly died: and that B. O. feloniously and of his forethought malice, then and there was present, aiding, assisting, abetting, comforting and maintaining the aforesaid A. O. to do and commit the felony and murder aforesaid, in form aforesaid; and so the aforesaid A. O. and B. O. the aforesaid C. D. at the county aforesaid, in the parish aforesaid, in manner and form aforesaid, feloniously, voluntarily and of their forethought malice, killed and murdered, against the peace and dignity of the commonwealth;\* and that one E. O. late of the parish of in the county of aforesaid, esquire, not having God before his eyes, but being seduced by the instigation of the devil, before the felony and murder aforesaid by the aforesaid A. O. and B. O. in manner and form aforesaid done and committed, that is to say, the day of in the year at the parish of in the county of aforesaid, the aforesaid A. O. to do and commit the felony and murder aforesaid, in manner and form aforesaid, maliciously, feloniously, voluntarily and of his forethought malice, did incite, move, abet, counsel and procure, against the peace and dignity of the commonwealth. See 9 Co. 116. a. lord Sanchar's case.

*If after the fact, then the form may be thus.*

And that E. O. late of in the county of esquire, well knowing the said (offender) to have done and committed the said felony in manner and form aforesaid, afterwards to wit: on the day of in the year, at the county of aforesaid, with force and arms, him the said (offender) did then and there feloniously, and of his forethought malice, receive, aid, and comfort, against the peace and dignity of the commonwealth.

*(H) Indictment for a misdemeanor, in receiving stolen goods as accessory, the principal felon being unknown.*

County, to wit:

The jurors for the body of the county of aforesaid, upon their oath do present, that late of aforesaid, la-

\* Indictments must conclude "against the peace and dignity of the commonwealth." *Const. Virg.* art. 18.

bourer, and his wife, being persons of evil name and fame, and of dishonest conversation, and common buyers and receivers of stolen goods, on the day of in the year with force and arms, at the county aforesaid, six silver table spoons of the value of twenty dollars, of the goods and chattels of one H. B. by a certain ill disposed person (to the jurors aforesaid, yet unknown) then lately before feloniously stolen, of the same ill disposed person, unlawfully, unjustly, and for the sake of wicked gain did receive, and have (they the said and his wife, then and there well knowing, and each of them well knowing, the said goods and chattels to have been feloniously stolen) to the evil example of the good citizens of this commonwealth, the great damage of the said H. B. against the form of the act of the general assembly in that case made and provided, and against the peace and dignity of the commonwealth.\*

*(I) Indictment against an accessory to a felony or burglary before the fact.*

(After you have drawn the indictment against the principal felon, bring the charge against the accessory on the same piece of paper, as follows:)

And the jurors aforesaid, upon their oaths aforesaid, do further present, that E. O. late of the parish of in the county of aforesaid, labourer, before the said felony† and burglary was committed in form aforesaid, to wit: on the day of in the year aforesaid, with force and arms at the parish aforesaid, in the county aforesaid, did feloniously and maliciously,‡ incite, move, procure, aid and abet the said A. O. to do and commit the said felony and burglary in manner and form aforesaid, against the peace and dignity of the commonwealth.

*(K) Indictment against an accessory for receiving the principal felon.*

(State the charge against the principal, and then say): And the jurors aforesaid, upon their oath aforesaid, do further present, that E. O. late of the parish of in the county of aforesaid, esquire, well knowing the said A. O. to have done and committed the said felony and burglary, in form aforesaid, afterwards to wit: the day of in the year aforesaid, with force and arms, at the parish aforesaid, in the county aforesaid, him the said A. O. did then and there feloniously receive, harbour and maintain, against the peace and dignity of the commonwealth.

\* It frequently happens that the court of examination, do not think the crime, with which the prisoner is charged, of sufficient magnitude to send him for further trial: in that case they possess a power of binding him over to the next court of the county, in which there will be a grand jury, who generally act upon an indictment in the above form.

† If felony only, leave out the word burglary.

‡ Instead of the words incite, move, procure, aid and abet, you may say, counsel, hire, or command.

*(L) Indictment against an accessory for receiving or buying a stolen horse; also for harbouring, or concealing the horse stealer.*

(State the charge against the principal, and then say): And the jurors aforesaid, upon their oaths aforesaid, do further present, that E. O. late of the parish of                      in the county of                      labourer, afterwards, to wit: on the                      day of                      in the year aforesaid, with force and arms, at the parish aforesaid, in the county aforesaid, one gelding, of a black colour, of the price of                      dollars, of the goods and chattels of the said                      abovementioned, so as aforesaid feloniously taken, stolen and lead away, did receive, buy and have (he the said E. O. then and there well knowing the said gelding, the goods and chattels last mentioned, to have been feloniously taken, stolen and lead away) against the form of the act of the general assembly in that case made and provided, and against the peace and dignity of the commonwealth.

(If against the person who harbours or conceals a horse stealer, pursue the above form to the word "labourer," then proceed): well knowing the said A. O. to have done and committed the felony aforesaid, in form aforesaid, afterwards, to wit: on the                      day of                      in the year aforesaid, with force and arms, at the parish aforesaid, in the county aforesaid, him the said A. O. did then and there feloniously harbour and conceal, against the form of the act of the general assembly, &c. (Conclude as above.)

## ADDITION.

*ADDITION signifies, a title given to a man, besides his christian and surname, setting forth his estate or degree, his trade, and the place where he inhabits. Burn's L. D. 14.*

**I**N indictments, in which the exigent shall be awarded, in the names of the defendants, in such indictments, additions shall be made of their estate or degree or mystery, and of the counties\* of which they were or be, or in which they be or were conversant; and if on the process upon the said indictments, in which the said additions be omitted, any outlawries be pronounced, they shall be void, frustrate and holden for none, and before the outlawries be pronounced, the said indictments shall be abated by the exception of the party, wherein the said additions be omitted. 1 Rev. Code 105. (From 1 H. 5. c. 5.)

1. *In which the exigent shall be awarded.* The exigent is a writ whereby the sheriff is commanded to proclaim the party in the county court, in order to his being outlawed. And by these words the act extendeth only to cases where process of outlawry may be awarded. *Cro. Eliz.* 148.

2. *In the names of the defendants.* Regularly by the common law, every man, ought to be named in all original, and other suits, by his christian name, and surname, and that before this act sufficed. 2 *Inst.* 665.

If it be a corporation aggregate of many persons, as mayor and commonalty; the mayor need not be named by his christian name, because that such a corporation standeth in lieu both of the christian name and surname. 2 *Inst.* 666.

3. *Additions shall be made.* Additions of estate or degree, are, yeoman, gentleman, esquire, and the like. *B. L. D.* 15.

Additions of trade or occupation, are those of husbandman, merchant, broker, taylor, smith, miller, carpenter, cook, brewer, baker, butcher, labourer, dyer, school-master, and the like. *Haw. B. 2. c. 23. s. 114.*

Additions of place, are, of such a town, or of such a county, &c. *B. L. D.* 15.

\* It is observable that this act requires, with respect to the addition of place, only the addition of the county, and not the parish, town, hamlet, &c. as in the act of 1 H. 5. and is conformable to the act of the general assembly on this subject. See 1 Rev. Code 105.



The addition as well of the estate, degree or mystery, as the place, ought by force of this act to be alleged in the first name; for an addition after the *alias dictus* (*otherwise called*) is ill: as for instance, where the indictment was against W. R. *otherwise called* W. R. of H. 2 Inst. 669. 3 Salk. 20.

Where there are several defendants, of different names and the same addition, it is safest to repeat the addition after each of their names, applying it particularly to every one of them. *Haw. B. 2. c. 23. s. 106.*

Where the father hath the same name, and the same addition, with a defendant being his son, the action is abateable unless it add the addition of the *younger*, to the other additions; but where the father is the defendant, there is no need of the addition of the *elder*. *Ibid.*

*Clerk* is a good addition of a *clergyman*. 2 Inst. 668.

*Gentleman* and *gentlewoman* are good additions. *Ibid.*

*Yeoman* is a good addition; and, in its legal acceptation, comprehends free-holders, and those who may do any act where the law requires one that is a *good and lawful man*. *Ibid.* and 1 Bl. Com. 406.

*Widow* or *singlewoman*, or, *wife* of such an one; also *spinster* are good additions. *Haw. B. 2. c. 23. s. 111.*

*Esquire*, in England, is of doubtful application, though generally annexed to justices of the peace (1 Bl. Com. 406. *Chris.* note 19.) In America, it is a mere complimentary title, indiscriminately bestowed on all ranks and professions, and seems to have no determinate signification.

*Servant* and *groom*, are not additions within this act, because they are not of any mystery. And *chamberer*, *butler*, *phantler*, or the like, are additions of special offices, and not of any mystery or occupation. 2 Inst. 668. *Haw. B. 2. c. 23. s. 117.*

Neither doth this act extend to unlawful practices, as extortioner, maintainer, thief, vagabond, heretic, and such like. *Ibid.*

If a man hath divers arts, trades or occupations, he may be named by any of them; and in general a man shall be named by his worthiest title of addition. 2 Inst. 668-9.

4. *Of which they were or be.* The addition of the estate, degree, or mystery, ought to be as the defendant was of at the day of the indictment brought, and not *late* of such a degree or mystery; but it is a good addition to name the defendant *late* of such a town or place, because men do often remove their habitation. 2 Inst. 670.

5. *Shall be void.* This being a judgment in law, is interpreted to be made void by a writ of error, or by the plea of the party coming in upon a *casus ulagatum*; for though the statute saith they shall be void, yet they are but voidable by a writ of error or plea. 2 Inst. 670.

6. *By the exception of the party.* But if the defendant appeareth upon process, and plead, taking no advantage thereof by exception, he hath lost the benefit hereof: but it seemeth that the bare appearance of the party, without plea, doth not salve the want of a good addition. *Haw. B. 2. c. 23. s. 125.*

ADULTERY. See FORNICATION.

AFFIRMATION. See OATHS.

## AFFRAY.

*I. What is an affray. II. How far it may be suppressed by a private person. III. How far by a constable, or peace officer. IV. How far by a justice of the peace. V. Punishment of an affray. VI. Warrants, indictments, &c. against affrayers.*

### I. WHAT IS AN AFFRAY.

1. AFFRAYS (from *affraier*, to terrify) are the fighting of two or more persons in some public place, to the terror of the people: for if the fighting be in private, it is no *affray*, but an *assault*. 4 *Bl. Com.* 144.

2. No quarrelsome or threatening words can amount to an *affray*; nor can any one justify laying his hands on such as quarrel, unless they proceed to blows; but the constable may, at the request of either party threatened, carry the other before a justice, to find sureties. *Haw. B. 1. c. 63. s. 2.*

3. But in some cases there may be an *affray*, where there is no actual violence; as, where a man arms himself with dangerous and unusual weapons, in such a manner as will naturally cause a terror to the people; which is said always to have been an offence at the common law, and is strictly prohibited by statute: for it is enacted, "That no man, great nor small, of what condition soever he be, except the ministers of justice, in executing the precepts of the courts of justice, or in executing of their office, and such as be in their company assisting them, be so hardy to come before the justices of any court, or either of their ministers of justice, doing their office, with force and arms, on pain to forfeit their armour to the commonwealth, and their bodies to prison, at the pleasure of a court; nor go nor ride armed, by night nor by day, in fairs or markets, or in other places, in terror of the country, upon pain of being arrested and committed to prison by any justice, on his own view, or proof by others, there to abide for so long a time as a jury, to be sworn for that purpose by the said justice, shall direct, and in like manner to forfeit his armour to the commonwealth; but no person shall be imprisoned for such offence by a longer space of time than one month." 1 *Rev. Code* 30. (From 2 *Ed. 3. c. 3.*)

4. No person is within the intention of the law, who arms himself to suppress dangerous rioters, enemies, &c. and disturbers of the peace of the commonwealth. *Haw. B. 1 c. 63. s. 10.*

5. Nor unless such wearing be accompanied with such circumstances as are apt to terrify the people ; consequently the wearing of common weapons, or having the usual number of attendants, merely for ornament or defence, where it is customary to make use of them, will not subject a person to the penalties of this act. *Ibid.* s. 9.

6. A man cannot excuse the wearing such armour in public, by alledging that such a one threatened him, and that he wears it for the safety of his person from his assault ; but no one shall incur the penalty of the statute for assembling his neighbours and friends in his own house, against those who threaten to do him any violence therein, because a man's house is his castle. *Ibid.* s. 8.

7. Any justice of the peace, or other person empowered to execute this act, may proceed thereon *ex officio* ; and if he find any person in arms contrary to the form of the statute, he may seize the arms, and commit the offender to prison ; and he ought also to make a record of the whole proceeding, and certify the same to the next county court. *Ibid.* s. 5.

But, in exercising this office, the act of assembly of Virginia materially differs from the act of parliament of 2 *Edw.* 3. and is certainly a very great improvement on it ; being more favourable to liberty. There the duration of the imprisonment is unlimited, but *here* it cannot exist, by law, for a longer space of time than one month, nor even that length of time, unless sanctioned by the verdict of a jury. It seems then, that as soon as a justice of the peace has apprehended an offender against the latter part of this act, either from his own view, or proof by others, he should issue his warrant directing a jury to be summoned, to determine what length of time (less than one month) the party should be imprisoned.

## II. HOW FAR IT MAY BE SUPPRESSED BY A PRIVATE PERSON.

1. Any one who sees others fighting may lawfully part them, and also stay them till the heat be over, and then deliver them to the constable, to be carried before a justice, to find sureties for the peace. *Hayw. B.* 1. c. 63. s. 11.

2. And the law doth encourage him hereunto ; for if he receives any harm by the affrayers, he shall have his remedy by law against them ; and if the affrayers receive hurt, by endeavouring only to part them, the standers by may justify the same, and the affrayers have no remedy by law. 3 *Inst.* 158.

3. But if either of the parties be slain, or wounded, or so stricken that he falleth down for dead ; in that case the standers by ought to apprehend the party so slaying, wounding, or striking, or so endeavouring the same, by hue and cry ; or else for his escape they shall be fined and imprisoned. *Ibid.*

## III. HOW FAR BY A CONSTABLE, OR PEACE OFFICER.

1. The power of a constable, as a peace officer, is derived from the common law of England ; and although, as a part of the common law,

the doctrine relating to that subject is entitled to a place in this work, yet few instances, I believe, have occurred in this state, where the same latitude of power as exercised in England has been attempted.

2. A constable (or other similar officer) is not only empowered, as all private persons are, to part an affray which happens in his presence, but is also bound at his peril to use his best endeavours to effect this purpose; and not only to do his best endeavours himself, but also to demand the assistance of others, which if they refuse to give him, they are punishable with fine and imprisonment. *Haw. B. l. c. 63. s. 13. 4 Bl. Com. 145.*

3. If a constable see persons either actually engaged in an affray, as by striking or offering to strike, or drawing their weapons, or the like; or upon the very point of entering upon an affray, as where one shall threaten to kill, wound, or beat another; he may either carry the offender before a justice, to find sureties for the peace, or he may imprison him of his own authority for a reasonable time, till the heat shall be over, and also afterwards detain him till he find such surety by obligation. But he has no power to imprison such an offender in any other manner, or for any other purpose; for he cannot justify the committing an affrayer to jail, till he shall be punished for his offence: and he ought not to lay hands on those, who barely contend with hot words, without any threats of personal hurt, and all that he can do in such case is to command them, under pain of imprisonment, to avoid fighting. *Haw. B. l. c. 63. s. 14.*

4. But he is so far intrusted with a power over all actual affrays, that though he himself is a sufferer by them, and therefore liable to be objected against as likely to be partial in his own cause, yet he may suppress them; and therefore, if an assault be made upon him, he may not only defend himself, but also imprison the offender, in the same manner as if he were no way a party. *Ibid. s. 15.*

5. And if an affray be in a house, the constable may break open the doors to preserve the peace; and if affrayers fly to a house, and he follow with fresh suit, he may break open the doors to take them. *Ibid. s. 16.*

6. But a constable hath no power to arrest a man for an affray done out of his own view, without a warrant from a justice, unless a felony were done, or likely to be done. *Ibid. s. 17.*

#### IV. HOW FAR BY A JUSTICE OF THE PEACE.

There is no doubt but that a justice of the peace may and must do all such things to that purpose, which a private man or constable are either enabled or required by the law to do. But he cannot without a warrant authorise the arrest of any person for an affray out of his own view; yet in such case he may make his warrant to bring the offender before him, in order to compel him to find sureties for the peace. *Haw. B. l. c. 63. s. 18.*

#### V. PUNISHMENT OF AN AFFRAY.

All affrayers in general are punishable by fine and imprisonment. *Haw. B. l. c. 63. s. 20-1-2-3. 4 Bl. Com. 145.*

## VI. WARRANTS, INDICTMENTS, &c. AGAINST AFFRAYERS.

1. Upon complaint made to a justice of the peace, he may issue his warrant to apprehend the offender; but if it be upon the application of any particular person, he should first administer to him the following oath:

The information which you shall give against A. O. of the county of            labourer, shall be the truth, the whole truth, and nothing but the truth. So help you God.

### (A) *Warrant to apprehend affrayers.*

To all constables and other officers in the county of  
county, to wit:

Whereas A. I. of the said county, hath this day made oath before me P. S. one of the commonwealth's justices of the peace for the county aforesaid, that on the            day of            in the year of our Lord            A. O. of the county of            aforesaid, labourer, and B. O. of the said county, labourer, at            in the said county, in a tumultuous manner made an affray, wherein the person of the said A. I. was beaten and abused by them, the said A. O. and B. O. without any lawful or sufficient provocation given to them or either of them by him, the said A. I. These are therefore to command you forthwith to apprehend the said A. O. and B. O. and bring them before me, or some other justice of the peace for the said county, to answer the premises, and to find sureties, as well for their personal appearance at the next court to be held for the said county, as for their keeping the peace in the mean time towards all our good people, and especially towards the said A. I. Herein fail not, at your peril. Given under my hand and seal, this            day of            one thousand, &c.

When the offender is apprehended by this warrant, and brought before the justice, he may admit him to bail, or refuse it, on due consideration of the nature and circumstances of the case; and on this subject, the acts of assembly concerning bail will best regulate his conduct. See title "BAIL."

The sum in which the offender and his securities should be bound is left to the discretion of the magistrate; but it should be recollected that *excessive bail* should in no instance be required, from the express letter of the *Declaration of Rights*, art. 9.

### (B) *Recognizance of bail.*

Memorandum, on this            day of            in the year of our Lord            personally came before me P. S. one of the commonwealth's justices of the peace, for the county of            A. O. of the county aforesaid, labourer, and B. R. and C. R. both of the same county, carpenters, and acknowledge that they owe to            esquire, governor or chief magistrate of the commonwealth of Virginia, namely, the

said A. O. fifty dollars,\* and the said B. R. and C. R. each respectively twenty-five dollars, current money; to be levied of their respective goods and chattels, lands and tenements, to the use of the said commonwealth if default is made in performance of the condition here under written.

The condition of this recognizance is such, that if the above bound A. O. shall personally appear before the commonwealth's justices of the peace, at the next court to be held for the county of \_\_\_\_\_ to answer to such matters as shall then and there be objected against him by A. I. of the said county, gentleman, concerning the assaulting, beating, and wounding the said A. I. by him, the said A. O. and concerning other misdemeanors tending to a breach of the peace, and if he do not depart without leave of the court, then this recognizance to be void, or else to remain in full force and virtue.

The condition of the recognizance being read to the parties, the justice should take their acknowledgment in the following manner:

You A. O. acknowledge yourself to be bound to \_\_\_\_\_ esquire, governor, &c. in the sum of fifty dollars, and you B. R. and you C. R. in twenty-five dollars each, to be levied of your respective goods and chattels, &c.

The justice must certify this recognizance to the next court, in order that further proceedings may be had thereupon; and if it appears to the court, upon hearing the evidence, that there is just cause of prosecution, they will direct the attorney for the commonwealth to prefer an indictment against the offender, and may commit or bail him, or bind him to his good behaviour, for any time, in such security and sum, or discharge him; as they shall judge most proper to be done.

If the offender fails to comply with his recognizance to appear before the court, the clerk must record his default, to entitle the commonwealth to its forfeiture; or if, when brought before the justice, he refuses to enter into a recognizance, or give security, he must be forthwith committed by such justice.

(C) *Mittimus.*

County, to wit:

To the keeper of the jail of the said county.

These are, in the name of the commonwealth, to command you to receive into your jail the body of A. O. late of the county aforesaid, labourer, taken by my warrant, and brought before me, being charged upon oath, by A. I. of the said county, gentleman, with assaulting, beating, and wounding the said A. I. in an affray, by the said A. O. and others, lately made; and that you safely keep him in your said

\* Since the act of congress altering the denomination of our money, from pounds, shillings, pence and farthings, to dollars, dimes, cents and mills, and the act of assembly of 1792 (1 Rev. Code 209) adopting the same, it seems more proper to express all sums, *officially* mentioned by justices of the peace, in dollars.



jail and custody, until he be thence discharged by due course of law.  
Given under my hand and seal, this            day of            in the  
year of our Lord

Where the commitment is for an affray, or for threatening and striking in the presence of the justice, the mittimus may be as follows :

(D) *Mittimus.*

County, to wit :

To the keeper of the jail of the said county.

I send you herewith the bodies of            of &c. and            of &c. whom I require you, in the name of the commonwealth, to receive into your custody, being convicted, by my own view, of an affray by them made in my presence ; and you are hereby commanded to keep them, and each of them, the said            and            safely in your jail, until they, or either of them, respectively, shall procure two sufficient persons to be bound with them, or either of them, separately, to the governor or chief magistrate of the commonwealth of Virginia ; that is to say, each of the securities in the sum of            dollars, and the said            and            each, in            dollars, to appear at the next court to be held for the said county of            to answer the premises, and in the mean time to be of good behaviour, or until they, or either of them, shall be otherwise discharged by due course of law. Given under my hand and seal, &c.

If a constable takes the offender on his own authority, and carries him before a justice, to whom he refuses to give security, the mittimus may be drawn in the same form, except that the cause of commitment should be varied, and very clearly set forth.

(E) *Indictment for an affray generally.*

County, to wit :

The jurors for the body of the county aforesaid upon their oath do present, That A. O. of the county of            aforesaid, taylor, and B. O. of the said county, blacksmith, with force and arms, on the            day of            in the year of our Lord            at the county aforesaid, being arrayed and unlawfully assembled together in a warlike manner, did make an affray, to the terror and disturbance of divers of the citizens of this commonwealth, then and there being, and to the evil example of all other the citizens of the said commonwealth, and against the peace and dignity of the commonwealth.

(F) *Indictment for an affray and beating another.*

County, to wit :

The jurors, &c. upon their oath present, that A. O. late of the parish of            in the county of            aforesaid, clerk, and B. O. late of the parish of            in the same county, merchant, with force and arms, on the            day of            in the year of our Lord            at the county of            aforesaid, of their malice aforethought, made an assault and affray in and upon one R. S. of the said county, yeoman,

then and there being, in the peace of God, and of the commonwealth aforesaid, and struck upon the head the said R. S. with certain swords, which the said A. O. and B. O. then and there severally held in their right hands, and then and there gave to the said R. S. divers wounds, which put him in great danger of his life, so that his life was greatly dispaired of, to the bad example of other citizens of the said commonwealth, and against the peace and dignity of the commonwealth.

The foregoing precedents, under this title, are adapted to affrays considered as offences at the common law. It yet remains to discuss the duty of a justice of the peace, in suppressing an affray prohibited by the act of assembly (1 *Rev. Code* 30.) This statute seems to contemplate two distinct offences; the one, where the affray is made in presence of a court of justice, or its ministers of justice, *doing their office*; the other, where the affray arises from going armed, "in fairs or markets, or in other places, in terror of the country." In the first instance, the punishment is a forfeiture of the armour, and imprisonment of the offender at the pleasure of a court; in the second, a forfeiture of the armour also, and imprisonment for so long time, not exceeding one month, as a jury, to be sworn for that purpose by the justice committing the offender, either upon *his own view*, or *proof by others*, shall direct.

(G) *Warrant to summon a jury under the above recited act.*

County, to wit:  
To constable in the said county.

Whereas it hath been fully proven to me, by the oath of A. J. and B. J. of the said county, that A. O. of the county aforesaid, labourer, and B. O. of the said county, labourer, on the                      day of                      in the year of our Lord                      with force and arms, viz. with swords, guns, and other warlike instruments, at                      in the county aforesaid, being arrayed and unlawfully assembled together in a warlike manner, did make an affray, by riding armed as aforesaid in the said county, in terror of the country. These are therefore to require you, in the name of the commonwealth, immediately upon sight hereof, to summon twelve good and lawful men of the vicinage of the said                      in the said county, to be and appear before me J. P. one of the commonwealth's justices for the said county, at                      aforesaid, in the said county, on the                      day of                      then and there to inquire of, do and execute all such things, as on the commonwealth's behalf shall be lawfully given them in charge, touching the affray aforesaid. And be you then there to certify what you shall have done in the premises, and further to do and execute what in behalf of the said commonwealth shall be then and there enjoined you. Given under my hand and seal, this                      day of                      in the year of our Lord

As it is probable there will seldom be occasion to enforce this act, I shall add no other precedents founded on it; but only observe, that the form of the oath to be administered to the jurors and witnesses will naturally arise out of the subject.

## AGE.

**AGE**, in law, signifies those particular periods of life which enable persons of both sexes to do certain acts, or which render them amenable to the process of law.

Full age in male or female is twenty-one years. 1 *Bl. Com.* 463.

Under twenty-one, males and females are called *infants*; and possess various privileges, and disabilities, according to their several degrees of age and discretion. See title **INFANTS**. See also 1 *Bl. Com.* 463. 4 *Bl. Com.* 22. *Co. Lit.* 78. b. *Fonb. on Eq. B.* 1. c. 2. s. 4. notes (y) (z) (a) (b).

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## ALIENS.

1. AN alien, in England, is defined to be a person who is born out of the ligeance of the king (1 *Bl. Com.* 366.) In Virginia, the definition of an *alien* may be formed, by contrasting it with that of a *citizen*.

2. Citizens are, 1st. All free persons born within the territory of the commonwealth; 2d. Those who have obtained a right to citizenship under the laws of the state; 3d. The children of citizens, where-soever born (1 *Rev. Code* 207.) And the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states. *Const. U. S.* art. 4. s. 2.

3. But neither an *adopted* citizen, nor a person holding any place or pension from a foreign state, is eligible to any office, executive, legislative or judiciary, in Virginia. 1 *Rev. Code* 207.

4. A citizen of *Virginia* may expatriate himself, by declaring that he relinquishes the character of a citizen, either by deed executed in presence of three witnesses, and recorded in court, or by open verbal declaration to that effect made in court, and there recorded. *Ibid.*

5. In the event of a war between the United States and a foreign state, the merchants and people of such state, in this commonwealth at the beginning of the war, shall not be molested on that account, but be warned by proclamation from the governor to depart within forty days; and if that time be not sufficient, as much more may be allowed as will enable them to sell their merchandises, and settle their affairs. But if, before their departure, credible information shall be received of the treatment of our citizens in their state, they may be attached, and treated as the citizens of this commonwealth may be in their country. *Ibid.* 16.

6. An alien residing in a foreign country, and receiving the protection of the laws, whether his sovereign be in amity with that country or not, owes a temporary local allegiance, and may be punished

## ALIMONY.

for treason. (*Fost.* 185.) So, also, may he be punished for murder, or other capital crimes. *Ibid.* 188.

7. In making title by descent, it shall be no bar to a party, that an ancestor through whom he derives his descent from the intestate is, or hath been, an alien. *Ibid.* 169.

8. Aliens cannot inherit real estate; or take, by descent (*Cruise's Dig. Tit.* 29. "DESCENT," c. 2. s. 12. *Co. Lit.* 2. b. *Harg.* note 1.) Whether they can take by devise, and for whose benefit, has been held to be doubtful. *Cruise's Dig. Tit.* 38. "DEVISE," c. 2. s. 20. 2 *Ves.* 365.

9. But aliens may purchase real estate, and take, but not hold; for, on office found, the commonwealth shall have it (*Co. Lit.* 2. a. b.) And so, without office found, if an alien purchase and die, the inheritance shall be cast on the commonwealth (*Co. Lit.* 2. b. *Plowd.* 229.) Yet aliens may acquire personal estate, or hire a house; may trade freely, may bring actions concerning personal property, and make a will and dispose of their personal estate. 1 *Bl. Com.* 372.

NOTE....How an alien may become a citizen of the United States see *Laws U. S.* vol. 6. p. 74. and vol. 7. p. 136.

## ALIMONY.

1. ALIMONY is a term which signifies that maintenance which is allowed to a wife, in case of separation from her husband (3 *Bl. Com.* 94) as where he turns her away, or she goes away upon ill usage (1 *Har. Ch. Prac.* tit. "FEME COVERTS." *Godolph. Rep.* Can. 509.

2. Suits for alimony were originally of ecclesiastical cognizance and the sentence was enforced by spiritual censures (3 *Bl. Com.* 94 2 *Burn's E. L.* 450.) During the civil wars, in England, there being no spiritual court, the court of chancery took jurisdiction (*Rep. in Ch.* 164. 2 *Show.* 283) and those decrees were held to be included in the act of parliament for confirming judicial proceedings (2 *Comy. Dig.* by *Rose*, 354. 1 *Rep. in Ch.* 186. 223.) In one case, however, alimony was decreed, before the civil wars. See *Lasbrook v. Tyler* (1 *Rep. Ch.* 44.) After the civil wars the court of chancery was considered as "invested with the same jurisdiction which the ecclesiastical court had," (1 *Ca. in Ch.* 251) and have exercised it ever since. See 2 *Comy. Dig.* "CHANCERY" (2 D.) 4 *Vin.* 175. 2 *Vern.* 493. 671. 752. 2 *Atk.* 96 98. 1 *Fonb.* 104. note (n). See note at the end of title "ALIMONY."

3. And a bill is usually brought by the wife, by her next friend (*Preced. in Ch.* 496. 2 *Fern.* 493. 2 *Atk.* 96. 98. 1 *Har. Ch. Pr.* tit. "FEME COVERTS.")

4. But alimony will not be decreed, unless there be a separation (1 *Ca. in Ch.* 251.) Nor can the court decree a perpetual separation without an agreement to that effect, and then unwillingly. 1 *Ves.* 17 3 *Atk.* 547.

5. And if alimony be decreed, the husband may bring an original bill, and have it set aside, or suspended, on offering to be reconciled (*Ca. tem. Finch* 153. 3 *Atk.* 296.) But such offer shall not discharge the arrears. 1 *Ca. in Ch.* 251. [See *post.* No. 11.]

6. So, if the husband, by his answer, offers cohabitation, the wife shall not be aided, further than to place her in a situation to pursue her remedy at law, for any separate estate which may have been settled on her. 1 *Vern.* 53.

7. Where the wife elopes and lives in adultery, alimony will not be allowed; but the fact must be distinctly put in issue, and plainly proved. 1 *Atk.* 276. 2 *Atk.* 97.

8. Regularly the husband is bound to allow alimony, *pendente lite*. *Godolph. Rep. Can.* 509.

9. If the wife leave the husband by reason of some default in him, as because of cruelty and the like, he shall be compelled to allow her alimony, although he received no fortune by her; so, on the other hand, if she depart, without his default, he is not obliged to allow her alimony, notwithstanding he had a considerable dowry with her. *Ibid.* 509.

10. And if it be doubtful through whose default it is they live asunder, the law in that case concludes, that the party that was *last* in fault is not *least* in fault. And therefore if the wife, who by her own default did voluntarily depart from her husband, shall after repent, and submitting herself to him shall desire reconciliation, and to be admitted to cohabitation with him, he then refusing her shall be obliged to allow her alimony, except in cases of elopement and adultery. *Ibid.* 509.

11. But if, by reason of the cruelty of the husband, the wife shall blamelessly flee from him, and the husband shall offer sufficient security for his future good behaviour to her, and her safety and peace with him, and the cruelty or ill usage not such, but that by such security the wife's peace and safety may be undoubtedly secured, and she notwithstanding refuse to return, in such case the law will not compel him to allow her alimony. *Ibid.* 509. See 3 *Atk.* 296. 4 *Bro. Ch. Ca.* 339. 2 *Ves. jr.* 191. 4 *Ves. jr.* 146.

12. If two persons claim the same woman as a wife by marriage, and one move to have her put in *sequestration*, she shall be allowed alimony, *pendente lite*, of that person at whose instance she is sequestered (*ibid.* 510.) But if the contest be only between a man and a woman, touching the validity of a marriage, as whether a marriage or not: in such case no alimony is due, till some matrimonial proof appear, or that it doth some way *constare de matrimonio*; but wherever a marriage appears, there alimony shall be due *pendente lite*. *Ibid.* 510.

13. If the husband be in *contempt*, the court will not admit any plea; in the same manner as if a man be *outlawed* at common law, he cannot bring any action. *Ibid.* 512.

NOTE.... There are so many contradictions and inconsistencies in the *dicta* of the English law writers relative to the jurisdiction of the court

of chancery, in cases of alimony, that it is only by a careful examination of *facts* and *dates* that the truth can be ascertained. That the ecclesiastical courts originally, and, for a series of years, *exclusively* exercised jurisdiction is a fact admitted on all hands. The first case in which the court of chancery decreed alimony was that of *Lasbrook v. Tyler*, 6 Car. I. (1631) reported in 1 *Rep. in Ch.* 24. [44.] In 1650, after the commencement of the *troubles*, as they were afterwards called, that is, after the death of Charles I. and the commencement of the commonwealth, the case of *Ashton v. Ashton* was decided, which was a naked case of alimony; and the sum of 300*l.* per annum decreed to be paid by the husband (see 1 *Rep. in Ch.* 87. [164]). The cases of *Russel v. Bodvil* (1 *Rep. in Ch.* 99. [186] 12 Car. II. 1660) and of *Whorewood v. Whorewood* (1 *Rep. in Ch.* 118. [223] 14 Car. II. 1662. and 1 *Ca. in Ch.* 250. 27 and 28 Car. II. 1674) were originally decided during the existence of the commonwealth, and alimony decreed, but were brought on again, after the restoration, in different shapes, and for distinct objects. The case of *Russel v. Bodvil*, was on a motion for process to carry the former decree into effect. The defendant, among other things, insisted there was then no jurisdiction in the court of chancery to enforce orders for alimony; but the chancellor, assisted by the judges on that point, declared that decrees for alimony were confirmed by the act concerning judicial proceedings, and awarded the process accordingly. *Whorewood v. Whorewood*, as reported in 1 *Rep. in Ch.* was a bill of review to reverse a decree for alimony pronounced during the troubles, on the ground that those decrees were not confirmed by the act of judicial proceedings. The court referred it to all the judges for their opinions, who certified that such decrees were confirmed, and the bill was dismissed. The same case of *Whorewood v. Whorewood*, as reported in *Ca. in Ch.* was an original bill brought by the husband, after the former decree for alimony, and the bill of review dismissed, offering to be reconciled and to cohabit. It was held that the bill was proper; and a decree was made that the alimony should cease, if the wife refused to return. But if the husband did not treat her as a gentleman and a good husband, the court declared the decree should again be reinstated.

In 2 *Show.* 290. [283] 34 and 35 Car. II. (1682) it is said, that "in the late time they sued for *alimony* in chancery; and the judges were then of opinion, that there being no spiritual court, nor civil law, the chancery had the jurisdiction in those days; but now we have courts-christian, the chancery will allow of demurrers to such bills for alimony." In 1 *Ca. in Ch.* 250. (1674) it was said, that "in the late times of the great troubles, the commissioners of the great seal, as they were then called, had jurisdiction given them in the case of alimony, *between Mr. Whorewood and his wife.*" On this *dictum*, it is presumable, *Mr. Fonblanque* has founded his argument, in which he attempts to prove that the court of chancery had not concurrent jurisdiction with the ecclesiastical court in cases of alimony; and that it was only by virtue of powers *expressly* given to the commissioners during the troubles, that they exercised it. See 1 *Fonb. B.* 1. c. 2. s. 6. note 2 (n) p. 104. *Philad. edit.* But a recurrence to facts and dates w



prove that the court of chancery exercised jurisdiction in cases of alimony, both *before* and *after* the troubles; and that *during* the troubles that court *exclusively* took cognizance of such cases, from necessity (there being no spiritual court) and by virtue of the *general* jurisdiction of the court.

It must be borne in mind, that the troubles, as they are called in England, commenced with the execution of Charles I. on the 30th of January, 1648-9, and terminated with the restoration of Charles II. on the 29th of May, 1660.

In the year 1631, the case of *Lasbrook v. Tyler*, was decided, in which alimony was allowed, "and also the benefit of a bond given before marriage." But for what, or to whom, the bond was given does not appear in the report.

The case of *Ashton v. Ashton*, in 1650, next occurred. This was during the troubles; and the decree was certainly pronounced by virtue of the *general* powers of the court; there appearing to be no *special* authority delegated to the commissioners, and the *suit* being mentioned as one in the *ordinary* mode of proceeding. The whole case is reported in the following words: "The plaintiff's suit is to be relieved against the defendant, her husband, for alimony, which upon several long hearings and all considerations imaginable taken in this cause, being a case of great consequence and between persons of quality, the defendant refusing to comply with the court's mediation, this court decreed the defendant to pay to the plaintiff 300*l.* per ann. so long as they lived apart." It is observable that this is the only case decided during the troubles which is *reported* as of the time, when the original decree was pronounced. The cases of *Russel v. Bodvil*, and of *Whorewood v. Whorewood*, came on after the restoration, on distinct and collateral points, and long after the time of pronouncing the original decrees. It is remarkable, too, that in none of the books is the fact mentioned that special powers were given to the commissioners, except in *cases in chancery*. From which circumstance it may fairly be inferred that the reporter was mistaken.

Opposed to the *dictum*, in *cases in chancery*, is the testimony of *Shower*, who states in *general* terms, that during the troubles the judges were of opinion that the court of chancery had jurisdiction, *there being no spiritual court*. The other assertion of this reporter, that the court of chancery would allow demurrers to bills for alimony, brought after the restoration, is not warranted by a single case. On the contrary, the cases of *Williams v. Calow*, in 1717 (2 *Vern.* 752) and *Watkyns v. Watkyns*, in 1740 (2 *Atk.* 98) with many others, decided *after* the restoration, prove that such bills have been entertained. The doctrine laid down in the text of *Treatise of Equity* (on which Fonblanque has commented) that the wife may have a separate maintenance from her husband, "by decree, for ill usage or alimony," may be considered as the settled rule of equity. See *Fonb. B. l. c. 2. s. 6. p. 94.* Philad. edit.

At the commencement of the troubles in England, in 1648-9, the lord chancellor, lord keeper, lords commissioners of the great seal, master of the rolls, and other officers of the court of chancery, cer-

tainly exercised as extensive powers as any of their predecessors. It was not until the year 1654, that an act of parliament passed, for limiting the jurisdiction of the high court of chancery, and regulating its proceedings (see *Scobell's acts*, part 2, p. 324.) But this act is perfectly silent as to the *general* jurisdiction of the court, leaving it as it stood before; and merely regulates the *practice*, and *restrains* the exercise of jurisdiction in *particular* cases; such as, that no relief should be given against a bond for the payment of money; (sect. 43.) that no trust or agreement concerning lands should be relieved, unless it be contained in writing, or possession had gone with the party claiming the trust; (sect. 44.) that no relief should be given upon averment of any *intention* in a deed, unless it appear by the deed itself; (sect. 45.) that chancery should relieve in no case, where the party could have relief at law; (sect. 46.) that no decree should be made against an act of parliament; (sect. 47.) that legacies should be sued for at common law, and not in chancery; (sect. 48.) that no relief should be given on a mortgage after three years forfeiture, unless on a new agreement, or in cases of infancy, &c. (sect. 49.) that after possession of the mortgagee, by recovery at law, he should not be put to account for the profits, unless by special agreement in writing, &c. (sect. 50.) These clauses, together with all the others in the same act, are merely *restrictive* of the *general* powers of the court; but not a word is said about *alimony*; and the chancellor, keeper, or commissioners of the great seal, for the time being, were directed to enforce the due execution of the act (see sect. 67. p. 332.) Even if this act had extended to cases of alimony, still it must be recollected that the case of *Ashton v. Ashton* was decided in 1650, *four years before the act passed*, and consequently under the *general* jurisdiction of the court.

## ALLEGIANCE.

1. ALLEGIANCE is the tie or *ligamen* which binds the subject or citizen to the state, in return for the protection offered (1 *Bl. Com.* 366.) And it is either *natural* or *local*: the *former* is said by most of the English jurists to be *perpetual*; is due from every man born within the dominions of the sovereign immediately on his birth; and cannot be forfeited, cancelled, or altered, by any change of time, place or circumstance; not even a residence abroad and swearing allegiance to another government (*Ibid.* 369.) But this position has been ably and satisfactorily combated by others (see *Locke on civil government*, sect. 115, &c. *Sedney on government*, vol. 2. c. 3. s. 36. *Tucker's Black.* vol. i. part 2, note k.) *Local* allegiance is due from an alien or stranger, so long as he continues and receives the protection of the government, but ceases the instant that he leaves it. 1 *Bl. Com.* 370.

2. By the ancient law, every man of the age of twelve years, or upwards, ought to take the oath of allegiance (1 *Comy. Dig.* "ALLEGIANCE," B. 1.) But women were not compellable to take it. See *T. L. tit.* "WAIVE."

3. And by the laws of Virginia, no person shall act in any office, legislative, executive, or judiciary, before he shall have given assurance of fidelity to the commonwealth, and have taken the oath adapted to his office (1 *Rev. Code*, p. 55. s. 2.) The oaths to be taken by a member or officer of either house of the general assembly may be administered by any member of the privy council, and certified to the clerk of such house; and those to be taken by any other person, if not otherwise directed, to be administered in some court of record, or some judge or justice thereof. *Ibid.* sect. 6.

NOTE.....How a citizen of Virginia may expatriate himself, see *tit.* "ALIENS."

## AMENDMENT.

UNDER this head it is proposed to consider the doctrine of amendments in criminal prosecutions and penal actions, only.

It had long been settled, that none of the *statutes of amendments* extended to criminal prosecutions, or actions and informations on penal statutes; and that no amendment could be admitted in such cases, but what was allowed in civil actions at the common law (*Haw. B. 2. c. 25. § 97.* 1 *Comy. Dig.* "AMENDMENT" [2. C. 1.] [2. C. 2.] 4 *Burr.* 2527.) And what amendments were allowed at the common law may be seen in 1 *Comy. Dig.* by Rose, *tit.* "AMENDMENT," (A) (B) *Doug.* 114. 2 *Term Rep.* 707. 4 *Term Rep.* 457. To remedy the inconvenience arising from mere formal exceptions to indictments and informations, it was enacted (at the session of 1803) "that after the verdict of twelve men, no judgment on any indictment or information, for felony, or any other offence whatsoever, shall be stayed or reversed, for any supposed defect or imperfection in any such indictment or information, so as the felony or offence therein charged to have been committed or done be plainly and in substance set forth, with convenient certainty, so as to enable the court to give judgment thereupon, according to the very right of the cause, any former law, custom or usage, to the contrary notwithstanding." 2 *Rev. Code*, 38.

It is the constant practice for the grand jury, who find a bill, to amend it, by their own consent, in a matter of form. *Haw. B. 2. c. 25. s. 98.*

## APPEALS.

1. AN appeal, in its common legal acceptance, is the removal of a cause from an inferior to a superior jurisdiction.

Appeals by the party's own private action, for a supposed criminal offence, are now seldom resorted to in England, and were never adopted in this state. See *Haw. B. 2. c. 23. 5 Burr. 2643.*

The practice of appeals in *civil* cases, as regulated by the laws of Virginia, and the adjudications of our superior courts, may be seen by a reference to the Indexes of the first and second volumes of the Revised Code, and of the several books of reports published in this state.

2. An appeal does not lie from a judgment, on an information for a misdemeanor. 3 *Call. 461.*

3. Nor, from an order of a county or corporation court for binding out an apprentice, or for rescinding his indentures. 1 *Hen. & Munf. 413.*

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## APPRENTICES.

APPRENTICES (from *apprendre*, to learn) are usually bound for a term of years, by deed indented, or indentures, to serve their masters, and be maintained and instructed by them. 1 *Bl. Com. 426.*

*I. Who may be bound apprentices, and by whom. II. The manner in which they shall be bound. III. Reciprocal duties of master and apprentice. IV. Grievances redressed. V. Adjudged cases on the subject of apprenticeships. VI. Precedents.*

### I. WHO MAY BE BOUND APPRENTICES, AND BY WHOM.

1. "Every orphan, who hath no estate, or not sufficient for a maintenance out of the profits (or, where such orphans are of tender years, the personal estate may be applied, till they are of age to bind. 1 *Rev. Code, 322*) shall, by order of the court of the county or corporation in which he or she resides, be bound apprentice by the overseers of the poor, until the age of twenty-one years, if a boy, or of eighteen years, if a girl, to some master or mistress; who shall covenant to teach the apprentice some art, trade, or business, to be particularized in the

indenture, as also reading and writing; and if a boy, common arithmetic, including the rule of three, and to pay him or her twelve dollars, at the expiration of the time; (or, the court may direct the overseers of the poor to contract for a sum not exceeding twenty dollars. 1 *Rev. Code*, 322) and the indentures of such apprentices shall be filed in the office of the clerk of the county, and not transferable to any person whatsoever, without the approbation of the court (1 *Rev. Code*, 173.)” But “it shall not be lawful for the overseers of the poor, who may hereafter bind out any *black* or *mulatto* orphan, to require the master or mistress to teach such orphan reading, writing or arithmetic.” 2 *Rev. Code*, 85.

2. “Any guardian may, with the approbation of the court in which his appointment shall be recorded, and not otherwise, bind his ward apprentice to such person, for learning such art or trade, and with such covenants on the part of the master or mistress, as the said court shall direct; and every such apprentice, with the like approbation, or any apprentice bound by his father, may, with the approbation of the court of that county in which the father shall reside, after he shall be sixteen years of age, agree to serve until he shall be twenty-four years of age, or any shorter time, and such agreement, entered on record, shall bind him.” 1 *Rev. Code*, 173.

3. “Every bastard child may be bound apprentice, by the overseers of the poor of the district for the time being, wherein such child shall be born; every male, until he attains twenty-one years, and every female, until she attains eighteen, and no longer; and the master or mistress shall be subject to the conditions prescribed in the case of an apprentice.” *Ibid.* 184.

4. “The overseers of the poor, of each district, shall monthly make returns to the court of their county of the poor orphans in their district, and of such children within the same, whose parents they shall judge incapable of supporting them, and bringing them up in honest courses; and the court is authorised to direct the overseers, or either of them, to bind out such poor orphans and children apprentices, to such persons as the court shall approve of, until the age of twenty-one years, if a boy, or eighteen years, if a girl, on the terms prescribed by the above act.” *Ibid.* 182.

## II. THE MANNER IN WHICH THEY SHALL BE BOUND.

1. One cannot be *bound* an apprentice without deed (1 *Salk.* 68.] And it was once held, that he could not be *discharged* without deed: (*Ibid.*) but it has since been determined otherwise; and that the indentures may be cancelled by parol agreement. 1 *Term Rep.* 39.

2. By the common law, the covenant or obligation of an infant, for his apprenticeship, will not bind him, so as to give the master an action for breach of covenants contained in the indentures (*Cro. Car.* 179.) But it is customary for the parent, or some friend, to become party to the indenture; and their covenants, on behalf of the infant, will bind them. See 8 *Mod.* 190. *Doug.* 500.

3. But a covenant between the master and a third person, the servant not being a party, makes no apprenticeship. 2 *Salk.* 479.

4. As the infant may be bound by indenture, so the apprenticeship may be determined by consent of all the parties concerned; which, in the case of parish poor children, includes the parish officer; in other cases, the father (or guardian) master, and infant. *Burr. Settle. Ca.* 562, 766. See 1 *East.* 59. 73.

5. But an infant bound apprentice cannot, by his own act, put an end to the contract at any time during his minority. *Per. Ld. Kenyon.* 6 *Term. Rep.* 558.

### III. RECIPROCAL DUTIES OF MASTER AND APPRENTICE.

1. A master may by law correct his apprentice for negligence or other misbehaviour, so it be done with moderation. 1 *Bl. Com.* 428.

2. Where an apprentice became lame, and had the king's evil, and, in the opinion of the surgeons, incurable, it was held that the master could not be discharged; for he takes his apprentice for better for worse, and is to provide for him in sickness, and in health. 1 *Str.* 99.

3. The master cannot compel his apprentice to go beyond sea, except he go with him, unless it be expressly so agreed, or the nature of apprenticeship import it; as, if the master be a mariner, or merchant adventurer. *Brownl.* 67. *Hob.* 134.

### IV. GRIEVANCES REDRESSED.

1. "The court of every county, city, or borough, shall at all times receive the complaints of apprentices, being citizens of any one of United States of America, who reside within the jurisdiction of such court, against their masters or mistresses, alledging undeserved or immoderate correction, insufficient allowance of food, raiment, or lodging, or want of instruction, and may hear and determine such cases in a summary way, making such orders thereupon, as in their judgment will relieve the party injured in future, or removing the apprentices, and binding them to other masters or mistresses, when it shall seem necessary; and may, also, in the same manner hear and determine complaints of masters or mistresses against their apprentices, for desertion without good cause." 1. *Rev. Code* 174.

2. An apprentice bound to the sea-service, and deserting in any port, may be apprehended by warrant from a magistrate, and committed to prison till the vessel be ready to depart, or the master shall require his discharge. But if it shall appear that the apprentice had been cruelly or improperly treated while on board, the magistrate may discharge him. See 2 *Rev. Code* 78. 79.

3. On the complaint of an apprentice, the master or mistress should be summoned ; and orders of sessions in England have been quashed, because it did not appear that the master had been summoned, or was present. See 1. *Str.* 143. 2. *Str.* 1013.

#### V. ADJUDGED CASES ON THE SUBJECT OF APPRENTICESHIPS.

1. An apprenticeship is a personal trust between the master and servant, and determines by the death of either of them. By such event the end and design of the apprenticeship cannot be obtained ; and it may be the executor is of another trade. But it would be very hard to construe the death of the master to be a discharge of the covenants ; for though the covenant for instruction fails, he still continues an apprentice with the executor *as to* maintenance ; who is liable in an *action of covenant*, but not to an *order of sessions*, for maintenance. And the executor is liable in covenant, if he does not instruct him, or find him another master. 1 *Salk.* 66.

2. But it has been held that an apprentice was not bound to serve the executrix of the master ; though the assets are liable on the master's covenants to maintain. 2 *Str.* 1266. For covenant lies against an executor in every case, though not named, unless it be such a covenant as is to be performed by the person of the testator, which an executor cannot perform. *Cro. Eliz.* 553.

3. If a master license his apprentice to leave him, he cannot after recall that license. *Mod. Ca.* 70.

4. The master is entitled to all that the apprentice shall earn ; consequently, if he runs away and goes to a different business, the master is entitled to all his earnings. 1 *Ves.* 83.

5. Inticing away an apprentice from his master is not an offence of a public nature, for which an indictment will lie. 6. *Mod.* 182.

6. An appeal will not lie from an order of court for binding out an apprentice, or rescinding his indentures. 1. *Hen. and Munf.* 412.

#### VI. PRECEDENTS.

##### (A.) *Indenture of an apprentice bound by the overseers of the poor, under an order of court.*

" This Indenture made this            day of            in the year of our Lord            between A B, and C D, overseers of the poor of            district, in the county of            of the one part, and A M, of said county, of the other part, witnesseth, that the said A B, and C D, overseers of the poor as aforesaid, by virtue of an order of the court of the aforesaid county, bearing date the            day of            in the year            have put, placed and bound, and by these presents do put, place and bind A P, of the age of            years, to be an apprentice with him the said A M, and as an apprentice with him the said A M to dwell from the date of these presents, until the said A P shall come to the age of 21 years, (or, if a female, until the said A P shall come to the



age of 18 years) according to the act of the General Assembly in that case made and provided. By and during all which time and term, the said A P shall the said A M, his said master, well and faithfully serve in all such lawful business as the said A P shall be put unto by his said master, according to the power wit and ability of him the said A P, and honestly and obediently in all things shall behave himself towards his said master, and honestly and orderly towards the rest of the family of the said A M. And the said A M, for his part, for himself, his executors, and administrators, doth hereby promise and covenant to and with the said overseers of the poor, and every of them, their and every of their executors and administrators, and their and every of their successors for the time being, and to and with the said A P, that he the said A M shall the said A P, in the craft, mystery and occupation of a , which he the said A M now useth, after the best manner that he can or may teach, instruct and inform, or cause to be taught, instructed and informed, as much as thereunto belongeth, or in any wise appertaineth: And that the said A M shall also find and allow unto the said apprentice sufficient meat, drink, apparel, washing, lodging, and all other things needful or meet for an apprentice during the term aforesaid: *And also that the said A M, shall teach, or cause to be taught to the said A P, reading, writing, and common arithmetic, including the rule of three ;\** and will moreover pay to the said A P the sum of † dollars, at the expiration of the aforesaid term. In witness whereof the parties to these presents have interchangeably set their hands and seals the day and year first above written.

(B.) *Indenture of an apprentice bound together with his father.*

This Indenture made this            day of            in the year of our Lord            between A F, and B S, of the county of            of the one part, and D M, of the said county, of the other part, witnesseth, that the said B S voluntarily, and with the approbation of the said A F, his father, hath put, placed and bound himself, and by these presents doth put, place and bind himself to be an apprentice with him the said D M, and as an apprentice with him the said D M to dwell, till the said B S shall attain the age of 21 years, which will be on the            day of            in the year            During all which term the said A F, and B S, do covenant and agree to and with the said D M, that the said B S the said D M shall well and faithful serve, in all such lawful business as the said B S shall be put unto by his said master, according to the best of the power, wit, and ability of him the said B S, and honestly

\* If the apprentice be a *black* or *mulatto* orphan, omit the part in italics. *Rev. Code 85; if a female, omit what relates to arithmetic. 1 Rev. Code 173.*

† If there be no special directions of the court, the blank must be filled with the word "twelve." *See 1 Rev. Code 173. and Ibid. 322.*

and obediently shall behave himself towards the said D M, and honestly and orderly towards the family of the said D M. And the said D M, on his part, doth covenant and agree to and with the said B S, that he the said D M will well and truly instruct the said B S, in the art or mystery of a , which the said D M now followeth, and will use all due diligence to make the said B S as perfect in the said art or mystery of a as possible. And that the said D M will allow to the said B S, good and sufficient meat, drink, apparel, washing, lodging, and all other things suitable for an apprentice during the said term. And also, &c. (*the parties may insert any other covenants which may be agreed on.*) In witness whereof the parties to these presents have bereunto set their hands and affixed their seals the day and year first above written.

☞ For proceedings in the case of Apprentices deserting from vessels, See title "SEAMEN."

## APPROVER.

Approvement is when a person indicted of treason or felony, and arraigned for the same, doth confess the fact before plea pleaded, and appeals or accuses others, his accomplices in the crime, in order to obtain his pardon. In this case he is called an *approver* or *prover*, *pro-bator*, and the party appealed or accused is called the *appellec.* 4 Bl. Com. 329.

But this practice has long been disused in England (4 Bl. Com. 330) and is expressly prohibited by the laws of Virginia, which declare, That "Approvers shall never be admitted in any case whatsoever." 1 Rev. Code 106.

From the ancient *law* of approvement has sprung the modern and analogous *usage*, in England, of admitting *accomplices.* Mac Nally's Ev. 183. But an accomplice is not there admitted of course; and only where the indictment cannot be supported without his evidence (*Ibid.* 203) It is almost an invariable rule to recommend a prisoner convicted on the sole testimony of an accomplice to the mercy of the crown. (*Ibid.*) For there are such strong objections to the credibility of a witness who swears to save his own life, that it would be hard to punish any person on his evidence. See 1 Hale 305.

## ARRAIGNMENT.

When the offender either appears voluntarily to an indictment, or was before in custody, or is brought in upon criminal process, to answer it in the proper court, he is immediately to be *arraigned* thereon. 4 *Bl. Com.* 322.

To arraign, is nothing else but to call the prisoner to the bar of the court, to answer the matter charged upon him in the indictment. *Ibid.*

The prisoner on his arraignment, though under an indictment of the highest crime, must be brought to the bar without irons, and all manner of shackles, or bonds, unless there be a danger of escape, and then he may be brought with irons. 2 *Hale* 219.

Also there is no necessity that a prisoner, at the time of his arraignment, hold up his hand at the bar, or be commanded so to do; for this is only a ceremony for making known the person of the offender to the court; and if he answers that he is the same person it is all one. *Haw. B.* 2. c. 28. s. 2.

Accordingly, in the case of the King v. *Radcliffe*, the prisoner refusing to hold up his hand, the ceremony was dispensed with. 1 *Bl. Rep.* 3.

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## ARREST.

AN arrest, in law, signifies, the restraint of a man's person, depriving him of his own will and liberty, and binding him to become obedient to the will of the law: and it may be called the beginning of imprisonment. *Lamb.* 93.

Under this title (which will chiefly be confined to arrests in criminal cases) I shall shew,

*I. Who may or may not be arrested. II. For what causes of suspicion an arrest may be. III. By whom the arrest shall be made. IV. The manner of an arrest. V. What is to be done after the arrest.*

### I. WHO MAY OR MAY NOT BE ARRESTED.

Persons privileged from arrest in *civil* cases are,

1. All persons on *Sunday*. 1 *Rev. Code* 122.
2. Persons going to, returning from, or attending their duty at any muster of militia. (2. *Rev. Code* 55) or any election of members of the state legislature; or of the United States; or of

electors to vote for a President ; witnesses duly summoned, and attending on any survey or arbitration made by order of court, or on commissioners appointed to take depositions in the case of contested elections ; unless the process be issued for treason, felony, riot, breach of the peace, or an escape out of prison or custody. 1 *Rev. Code* 122.

3. *Witnesses* attending at court, &c. being duly summoned, and *actually* a witness in the cause expressed in the *subpoena*, are privileged during their attendance, and in coming to and returning from thence, allowing one day for every twenty miles from their places of abode, 1 *Rev. Code* 278.

4. The same privilege is allowed to *electors*. *Ibid.* 20.

5. Also to *grand jurors*. *Ibid.* 100.

6. And to *members* of the *General Assembly*, during whose privilege process in which they are parties shall be suspended ; if delivered by privilege from execution, they shall return as soon as the privilege ceaseth, or be liable to an escape. *Ibid.* 22.

7. The *Governor* ; *Members of the Privy Council* ; *Judges of the Superior Courts* ; and the *Sheriff* of any county, during his continuance in office, cannot be arrested by the ordinary process ; but instead thereof a summons shall issue, &c. (1 *Rev. Code* 77.) And in all such cases, after judgment, and the return of a *feri facias*, by the sheriff of the county in which the defendant resides, that no effects, or not sufficient, are to be found, a *capias ad satisfaciendum* may issue, as in other cases. *Ibid.*

8. Any *minister of religion* licensed according to the rules of his sect, who has taken the oath or affirmation of fidelity to the commonwealth, while he is publicly preaching or performing religious worship, in any church, meeting-house, &c. *Ibid.* 276.

9. A *corporation* cannot be arrested, but the process is a *distringas*. 3 *Salk.* 46.

✎ In England, it is held to be a privilege of the court, that no persons who have any relation to a suit which calls for their attendance, as suitors, bail, &c. shall be arrested, while going to, attending at, or returning from court. See 2 *W. Bl. Refl.* 1113. 1193. 1. *H. Bl.* 636.

## II. FOR WHAT CAUSES OF SUSPICION AN ARREST MAY BE.

The causes of suspicion, which are generally held sufficient to justify the arrest of an innocent person, are these which follow :

(1) The common fame of the country ; but it ought to appear upon evidence, in an action brought for such arrest, that such fame had some probable ground. *Haw. B.* 2. c. 12. s. 9.

(2) The being found in such circumstances as induce a strong presumption of guilt ; as coming out of a house wherein murder hath been committed, with a bloody knife in his hand ; or being found in

possession of any part of goods stolen, without being able to give a probable account of coming honestly by them. *Ibid.* s. 12.

(3) The behaving in such a manner as betrays a consciousness of guilt; as where a man accused of felony, on hearing that a warrant is taken out against him, doth abscond. *Ibid.* s. 13. But he is not thereby guilty. *Haw. B. 2. c. 17. s. 3.*

(4) The being in company with one known to be an offender, at the time of the offence, or generally at other times keeping company with persons of scandalous reputations. *Haw. B. 2. c. 12. s. 11.*

(5) The living an idle, vagrant, and disorderly life, without having any visible means to support it. *Ibid.* s. 10.

(6) The being pursued by hue and cry. *Ibid.* s. 6. & 2 *Inst.* 52. It had been generally held that no such causes of suspicion, as any of the above, would justify the apprehension of a person, *by any body, if no felony had been actually committed*; unless in the case of hue and cry. (*Haw. B. 2. c. 12. s. 16*). But it has since been determined, that, on a *given charge* of felony, the officer is justified in making the arrest, though the goods were not found, on a search warrant, and the jury find that no felony was committed: and that he that makes the charge is alone liable; the officer having done nothing but his duty. *Doug.* 359.

So, it has been decided that a constable or other peace officer may justify an arrest for felony, on *probable evidence* that a felony has been actually committed, although no *positive charge* be made. 3 *L. Haw.* 162.

### III. BY WHOM THE ARREST SHALL BE MADE.

1. If a justice see a felony or other breach of the peace committed in his presence, he may in his own person apprehend the felon, and so he may by word command any person to apprehend him, and such command is a good warrant without writing: but if the same be done in his absence, then he must issue his warrant in writing, under seal. 2 *Hale.* 86. 2 *Inst.* 52. 1 *Hale* 587. 4 *Bl. Com.* 292.


2. So in like cases may sheriffs, coroners, constables and watchmen arrest without warrant. *Ibid.*

3. And all persons, who are present when a felony is committed, or a dangerous wound given, are bound to apprehend the offender, on pain of being fined and imprisoned for their neglect, unless they were under age at the time. *Haw. B. 2. c. 12. s. 1.*

Also, every private person is bound to assist an officer demanding his help for the taking of a felon, or the suppressing of an affray, &c. *Ibid.* s. 7. And if he have a prisoner in his keeping, arrested on suspicion of treason, murder or felony, and negligently suffer him to escape, before commitment, he may be fined. 1 *Rev. Code* 106. 119.

4. If an affray be made to the breach of the peace, any man may by warrant *in law* (i. e. without a warrant from a justice,) restrain any of the offenders, to the end the peace may be kept; but after the affray is ended, they cannot be arrested without *express* warrant. 2 *Inst.* 52.

*Hitherto we have considered an arrest WITHOUT warrant ; we are next to treat of it WITH a warrant.*

1.  For what is to be done previously to granting a warrant, see title WARRANT.

2. The warrant is ordinarily directed to the sheriff or constable, and they are indictable, and subject to a fine and imprisonment, if they neglect or refuse it. 1 *Hale* 581.

3. If it be directed to the sheriff he may command his under sheriff to execute it ; but every other person must personally execute it ; yet any one may lawfully assist him. *Haw. B. 2. c. 13. s. 29.*

4. If a warrant be generally directed to all constables, no one can execute it out of his own precinct, for in such case it shall be taken respectively to each of them within their several districts, and not to one of them to execute it within the district of another ; but if it be directed to a particular constable, he may execute it any where within the jurisdiction of the justice, but is not compellable to execute it out of his own precinct. 1. *L. Raym.* 546. 1 *Hale* 581. 2 *Hale* 110.

5. The justice that issues the warrant may direct it to a private person if he pleaseth, and it is good ; but he is not compellable to execute it, unless he be a proper officer. 1 *Hale* 581.

6. If a warrant is directed to two or more jointly, yet any one of them alone may execute it. *Dalt. c. 169.*

#### IV. THE MANNER OF AN ARREST.

1. The officer to whom a warrant is directed and delivered ought with all speed and secrecy to find out the party, and then to execute the warrant. *Dalt. c. 169.*

2. It is certainly an offence of a very high nature, to oppose one who lawfully endeavours to arrest another for treason or felony. *Haw. B. 2. c. 17. s. 1.* 1 *Hale* 606.

3. An arrest in the night is good, both at the suit of the commonwealth and of the citizen, else the party may escape. 9 *Co.* 66.

4. A justice of the peace cannot authorise the arrest of a felon by a warrant issued by him while he is out of the county in which he is justice ; although the felony was committed in the county in which the justice resides. 1 *Hale* 580. 1.

5. A private person cannot raise power to arrest or detain a felon. 1 *Hale* 601.

But any justice, or the sheriff, upon just cause, may take of the county any number that he shall think meet, to pursue, arrest, and imprison traitors, murderers, robbers, and other felons ; or such as do break, or go about to break or disturb the commonwealth's peace : and every man being required, and not aged and infirm, ought to assist and aid them, on pain of fine and imprisonment. *Dalt. c. 171.*

And in such case it is referred to the discretion of the justice, sheriff, or other officer, what number they will have to attend on them, and how and after what manner they shall be armed or otherwise furnished. *Dalt. c. 171.*

6. As to breaking open doors, in order to apprehend offenders, the law never allows any such extremities, but in cases of necessity ; and, therefore, no one can justify the breaking open another's door to make an arrest, unless he first signify to those in the house the cause of his coming, and request them to give him admittance. *Haw. B. 2. c. 14. s. 1.*

But where a person authorised to arrest another, who is sheltered in a house, is denied quietly to enter into it, in order to take him, he may justify breaking open the doors in the following instances.

(1) Upon a *capias* grounded on an indictment for any crime whatsoever ; or upon a *capias* from the chancery or other superior court ; or a warrant from a justice to compel a man to find securities for the peace or good behaviour. *Haw. B. 2. c. 14. s. 3.*

(2) When one *known* to have committed a treason or felony, or to have given another a dangerous wound, is pursued either with or without a warrant, by a constable or private person : but where one lies under a *probable suspicion* only, and is not indicted, *it seems* that no one can justify the breaking open doors in order to apprehend him. (*Haw. B. 2. c. 14. s. 3.*) But it is held by other authorities, that *probable cause of suspicion* is sufficient to justify the breaking open doors, as much as if there was an *express* charge. See 1 *Hale* 580, 1. 2 *Hale* 117.

And not only the person's own house may be broken, after refusal to open the door, on demand made and information given of the cause of the arrest, but much more the house of another ; *for so the sheriff may do on civil process.* But he does it at his peril ; for if the felon be not there, he is a trespasser to the stranger whose house it is. 2 *Hale* 117.

But it seems that he that arrests as a *private man*, barely upon suspicion of felony, cannot justify the breaking open doors to arrest the party suspected, but he doth it at his peril, viz. if in truth he be a felon, then it is justifiable, but if he be innocent, it is not justifiable. 1 *Hale* 82.

But a *constable* in such case may justify, and the reason of the difference is this ; because that in the former case it is but a thing permitted to private persons to arrest for suspicion, and they are not punishable if they omit it ; and therefore they cannot break open doors ; but in case of a constable, he is punishable if he omit it upon complaint. 2 *Hale* 92.

(3) Upon a warrant from a justice of the peace, to find sureties for the peace or good behaviour. 1 *Hale* 582. 2 *Hale* 117.

(4) On a warrant to search for stolen goods, the doors may be broke open, if the goods are there ; and if they are not there, the constable seems indemnified, but he that made the suggestion is punishable. 2 *Hale* c. 18. p. 151.

(5) Where forcible entry or detainer is found by inquisition before justices of the peace or appears on their view. *Haw. B. 2. c. 14. s. 6.*

(6) On a *capias utlagatum*, or *capias pro fine*. *Ibid. s. 4.*

(7) On the warrant of a justice of the peace for the levying of a for-



feiture, in executing of a judgment, or conviction for it, grounded on any statute, which gives the whole or any part of such forfeiture to the commonwealth. *Ibid.* s. 5.

(8) Where an affray is made in a house, in the view or hearing of the constable, or such affrayers take shelter in a house. *Ibid.* s. 8.

(9) If there be disorderly drinking or noise in a house, at an unreasonable time of night, especially in inns, taverns, or alehouses, the constable or his watch, demanding entrance, and being refused, may break open the doors, to see and suppress the disorder. 2. *Hale* 95.

(10) Wherever a person is lawfully arrested for any cause, and afterwards escapes, and shelters himself in an house. *Haw. B. 2. c. 14. s. 9.*

(11) But upon a general warrant, without expressing any felony or treason, or surety of the peace, the officer cannot break open a door. 1 *Hale* 584.

(12) Neither ought doors to be broke open to take a person, who is required to take certain oaths by virtue of a statute, because in such case the warrant is not grounded on a precedent offence. *Haw. B. 2. c. 14. s. 11.*

(13) In a civil suit, the officer cannot justify the breaking open an outward door or window in order to execute process. If he doth, he is a trespasser. But if he findeth the outward door open, and entereth that way, or if the door be opened to him from within, and he entereth, he may break open inward doors, if necessary, in order to execute his process. *Fost.* 319.

And the latter part of this rule extends to cases where there are separate apartments in the same house, and but one *common entry*, by an *outer door* : if the officer gain peaceable admittance at *that*, he may break open the door of a *lodger's apartment*, to execute mesne process. *Cowp.* 1.

A man's house is his castle for repose to *himself and family* (*Fost.* 319.) Therefore the rule must be confined to a breach of the house in order to arrest the *occupier*, or *any of his family*, who have their domicile, their ordinary residence there. For if a stranger, whose ordinary residence is elsewhere, upon a pursuit taketh refuge in the house of another, this is not *his* castle, *he* cannot claim the benefit of sanctuary in it. *Fost.* 320. And the same law applies to the goods of a stranger deposited in the house of another, to avoid an execution. See 5. *Co.* 93. a.

The rule, that a man's house is his castle, must also be confined to arrests *in the first instance*. For if a man, being legally arrested (and laying hold of the prisoner and pronouncing the words of arrest is an actual arrest) escapeth from the officer, and taketh shelter, though *in his own house*, the officer may, upon fresh suit, break open doors in order to take him, having first given due notice of his business and demanded admission, and been refused. *Fost.* 320.

☞ And let it be remembered, that not only in this but in every case where doors may be broken open in order to arrest, whether in cases *criminal* or *civil*, there must be such notification, demand, and

refusal, before the parties concerned proceed to that extremity. *Ibid.*

But where a felony hath been committed, or a dangerous wound given or even where a minister of justice cometh armed with process founded on a breach of the peace, the party's own house is no sanctuary for him; doors may in any of these cases be forced, the notification, demand, and refusal beforementioned, having been previously made. The rule, therefore, that a man's house is his castle, must be confined to the case of arrests in civil suits. *Ibid.*

(14) Finally, in all these cases, if an officer, to serve any warrant, enters into a house, the doors being open, and then the doors are locked upon him, he may break them open, in order to regain his liberty. *Haw. B. 2. c. 14. s. 11.*

7. If there be a warrant against a person, for a trespass or breach of the peace, and he flies, and will not yield to the arrest, or being taken makes his escape, if the officer kill him, it is murder. But if such person, either upon the attempt to arrest, or after the arrest, assault the officer, to the intent to make his escape from him, and the officer standing upon his guard kills him, this is no felony: for he is not bound to go back to the wall as in common cases of *se defendendo*, for the law is his protection. And if such person kill the officer, it is murder. 2 *Hale* 117. 118. 1 *Stra.* 499. 4 *Bl. Com.* 293.

But where a warrant issueth against a person for felony, and either before arrest, or after, he flies, and defends himself with stones or weapons, so that the officer must give over his pursuit, or otherwise cannot take him without killing him, if he kill him, it is no felony. And the same law is for a constable that doth it by virtue of his office, or on hue and cry. 2 *Hale* 118.

But then there must be these cautions: 1. He must be a lawful officer; or there must be a lawful warrant. 2. The party ought to have notice of the reason of the pursuit, namely, because a warrant is against him. 3. It must be a case of necessity, and that not such a necessity as in the former case, where an assault is made upon the officer; but this is the necessity, namely, that he cannot otherwise be taken. 2 *Hale* 119.

But though a private person may arrest a felon, and if he fly, so as he cannot be taken without he be killed, it is excusable in this case for the necessity; yet it is at his peril that the party be a felon, for if he be innocent of the felony, the killing (at least before the arrest) seems at least manslaughter; for an innocent person is not bound to take notice of a private person's suspicion. 2 *Hale* 119.

8. An officer sworn and commonly known, and acting within his own precinct, need not shew his warrant; but he ought to acquaint the party with the substance of it. *Haw. B. 2. c. 13. s. 28.*

But a private person, or even an officer, if he acts out of his precinct, or is not sworn and commonly known, must shew his warrant, if demanded. *Ibid.* Otherwise the party may make resistance, and needs not obey it. *Dalt. c. 169.*

But if the officer has no warrant, but arrests by virtue of his office, as

a constable, &c. it is sufficient to notify that he is constable, or that he arrests in the name of the commonwealth. 1 *Hale* 583.

9. Bare words will not make an arrest, without touching the person, or otherwise confining him. But if an officer comes into a room, and tells the party he arrests him, and locks the door, this is an arrest; for he is in custody of the officer. So if he submits to the officer. 1 *Salk.* 70. *Bull. N. P.* 62. *B. R. H.* 387.

10. If the officer, after an arrest, suffer the prisoner to go at large, on a promise to return and find sureties, and he accordingly returns, it seems that he may detain him, though the contrary was formerly holden. *Haw. B.* 2. c. 13. s. 9.

But it has been settled that where an officer arrests a person on mesne civil process, and voluntarily suffers him to escape, he may retake him at any time before the return of the writ. 2 *Term Rep.* 172. But it is otherwise on an execution. See the difference between MESNE process and an EXECUTION. 2 *Term Rep.* 176, 7.

But if the party arrested do escape, the officer upon fresh suit may take him again and again, so often as he escapeth, altho' he were out of view, or that he shall fly into another town or county. *Dalt. c.* 169.

11. A warrant to arrest the party, to appear at the next sessions, &c. means the next sessions after the arrest, and not after the date of the warrant. 8 *Term Rep.* 110.

12. The warrant of a magistrate, not returnable at any particular time, is in force, till executed, during his life. *Peake's Ca. n. p.* 234.

## V. WHAT IS TO BE DONE AFTER THE ARREST.

1. When a private person hath arrested a felon, or one suspected of felony, he may detain him in custody till he can reasonably dismiss himself of him; but with as much speed as conveniently he can, he may do any of those three things:

(1) He may carry him to the common jail, but that is now rarely done. 1 *Hale* 589. 2 *Hale* 77.

(2) He may deliver him to the constable, who may either carry him to jail, or to a justice of the peace. 1 *Hale* 589.

(3) He may carry him immediately to a justice of the peace of the county where he is taken. 1 *Hale* 580.

2. If the arrest be by warrant, then the officer must carry the party according to its direction: if it be to bring the party before that justice specially, he must carry him before the same justice; if before any justice of the county, then it is at the election of the officer, not of the party, before whom he will carry him. 1 *Hale* 582. 2 *Hale* 112.

3. If the arrest be in a different county from that in which the offence was committed, the party must be carried before a justice of the county where arrested, and by his warrant conveyed to a justice of the county where the offence was committed. 1 *Rev. Code* 105.

4. But if the time be unreasonable, as in or near the night, where-  
by he cannot attend the justice, or if there be danger of a present res-  
cue, or if the party be sick, he may secure him till the next day, or  
such time as it may be reasonable to bring him. 2 *Hale* 119.

5. And when he hath brought him to the justice, yet he is in law  
still in his custody, till the justice discharge, or bail, or commit him.  
2 *Hale* 120.

6. But it is said, the constable is not obliged to return the warrant  
itself, but may keep it for his own justification, in case he should be  
questioned for what he had done; but only to return what he had  
done upon it. *L. Raym.* 1196.

ARSON. See *Burning*.

## ASSAULT AND BATTERY.

*I. Assault, what. II. Battery, what. III. In what  
cases they may be justified. IV. Remedy for.*

### I. ASSAULT, WHAT.

ASSAULT (*assaultus*, from the French *assayler*) is an attempt, with  
force and violence, to do a corporal injury to another, as by raising a  
stick or fist in a threatening or insulting manner; striking at another  
with a cane or stick, though the party striking misses his aim; drawing  
a sword or bayonet; throwing a bottle or glass with intent to wound or  
strike; presenting a gun at a person who is within the distance to  
which the gun will carry; holding up a fork at a person who is with-  
in reach; or by any other similar act, accompanied with such circum-  
stances as denote at the time an intention coupled, with a present abi-  
lity of using actual violence against the person of another. *Haw. B. l.*  
*c. 62. s. 1. Setw. n. p. 21.*

2. And from hence it clearly follows that one charged with an assault  
and battery may be found guilty of the assault, and yet acquitted of  
the battery: But every battery includes an assault; therefore on an  
indictment of assault and battery, in which the assault is ill laid, if  
the defendant be found guilty of the battery, it is sufficient. *Ibid.*

3. It seems agreed at this day, that no words whatever can amount  
to an assault, notwithstanding the many ancient opinions to the con-  
trary. *Ibid.*

### II. BATTERY, WHAT.

*Battery* (from the Saxon *batte*, a club, or *beatan*, to beat, from whence  
cometh also the word *battle*) is, when any injury whatsoever, be it

ever so small, is actually done to the person of another, in an angry, or revengeful, or rude, or insolent manner, as by spitting in his face, or any way touching him in anger, or violently jostling him out of the way, and the like. *Haw. B. 1. c. 62. s. 2. 3 Bl. Com. 120.*

### III. IN WHAT CASES THEY MAY BE JUSTIFIED.

1. A person may justify an assault in defence of his person, or of his wife, or master, or parent, or child within age; and may even wound in defence of his person, though not of his possessions. 3 *Salk. 46. Selw. N. P. 25.* So a wife may justify in defence of her husband. 1 *L. Raym. 62.*

2. If an officer authorised by warrant lay hands on another to arrest him, or if a parent, in a reasonable manner, chastise his child, a master his servant, a schoolmaster his scholar, or a jailor his prisoner, and even a husband his wife, as some say; or if one confine a friend by force, who is mad, or if one wrests a sword from another, who offers violence therewith, in all those cases, and many others of a similar nature, it is justifiable. *Haw. B. 1. c. 60. s. 23.*

3. So, if a man endeavours to deprive me of my goods or possessions, I may justify laying hands upon him to prevent him, and in case he persists with violence, I may proceed to beat him away. 3 *Bl. Com. 121.*

4. Thus too in the exercise of an office, as that of church-warden or beadle, a man may lay hands upon another to turn him out of the church, and prevent his disturbing the congregation. *Ibid.*

5. The defendant may avail himself of these justifications, either by giving them in evidence, on the plea of *not guilty*, if indicted. (*Haw. B. 1. c. 62. s. 3*); or by pleading them specially, if sued; as, *son assault demesne, mollitur manus impositus*, &c. 3 *Bl. Com. 120, 1.* And where these pleas would be proper, see *Selwyn's Nisi Prius*, ch. 3.

### IV. REMEDY FOR.

1. The civil remedy for assault and battery, or for either, is by action of *trespass vi et armis*. 3 *Bl. Com. 120, 1.*

2. But the party injured may proceed against the defendant, both by action and indictment, for the same offence. *Haw. B. 1. c. 62. s. 4.*

3. And although in general, where there is an action and indictment depending for the same offence, the court will compel the prosecutor to make his election which he will pursue, before they will enter upon the criminal complaint (2 *Burr. 720*) yet it has lately been refused, in the case of assault and battery; on the ground that the *fine*, upon the criminal prosecution, and the *damages* to the party, in the civil ac-

tion, are perfectly distinct in their natures. 1 *Bos. & Pull.* 191. *Setw.* N. P. 21, note (2).

4. The declaration must be *positive*, and charge, "for *that*," omitting the *whereas*. *Setw.* N. P. 24. See Note to *Lomax v. Hord*, reported in 3 *Hen. & Munf.*

5. Against joint trespassers there can be but one satisfaction, and therefore if they are sued in one action, although they sever in pleas and issues, yet one jury shall assess damages for all, and if all the issues are found for the plaintiff, the jurors ought not to sever the damages, for, if they do, the verdict will be vitious. And if in such case judgment be entered for the separate damages, such judgment will be erroneous. But, before judgment, the defect of the verdict may be cured, by the entry of a *nolle prosequi* against all the defendants, except one, and taking judgment against that one only. *Setw.* N. P. 33. And this last is called taking judgment *de melioribus damnis*. 1 *Wils.* 30.

6. On the above principles, it has been held, that if a battery be committed by several, and a recovery had against one, such recovery may be pleaded in bar to an action brought against any of the others for the same battery. *'Esp.* N. P. 319. *Yctv.* 68. See also S. P. 1 *Hen. & Munf.* 481. 2 *Hen. & Munf.* 355.

7. So if a *trespass be joint*, a release to one is good to all; for though a trespass be committed by several, yet it may be sued against one or all, for in trespasses all are principals, and each is answerable for his fellow's act; and as there can be but one satisfaction, a release to any one is a release of the trespass, and all have equal benefit. *'Esp.* N. P. 415.

And the law is the same, even though it be *expressly* stipulated that the release should only operate to discharge the one released, as to the part which *he* took, in the assault, and should not be deemed a satisfaction as to the *other trespassers*. 2 *Hen. & Munf.* 38.

8. So, if the plaintiff bring a joint action of trespass, and the parties sever in their pleas, and one is tried and found guilty, and damages assessed, the plaintiff may enter a *nolle prosequi* as to the others. *'Esp.* N. P. 415.

9. So, where a joint trespass was committed, and the plaintiff brought his action against one, and recovered, it was held that he had made his election, and such recovery might be pleaded in bar to an action against the others. *Ibid.*

10. But, if in an action for assault and battery against *A.* and *B.* it be proved that the assault by *A.* was more violent than by *B.* the jury may give their verdict against *both*, to the amount which they think the most culpable ought to pay. 4 *'Esp. Ref.* 158.

11. On a judgment by default against joint trespassers, the plaintiff cannot execute separate writs of inquiry, and sever the damages. But, before final judgment, the court will permit the plaintiff, in order to cure the defect, to set aside his own proceedings, on the payment of costs, and to issue a new writ of inquiry. 6 *Term Ref.* 199.

12. If trespass be brought against one, *simul cum* others, if nothing be proved against one, he may be examined as a witness for the rest. *'Esp.* N. P. 419. *Bull.* N. P. 286. 1 *Wash.* 187.

**County, to wit :**

To \_\_\_\_\_, to execute.

*Acknowledged before me.*

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rant (or of a warrant from B. J. one of the justices of the peace for the said county, as the case may be) and charged on oath by A. I. of having violently assaulted and beaten the said A. I. (*upon &c. with &c.*) : and the said A. O. having now been required by me to find sufficient sureties as well for his personal appearance at the next court to be held for the said county to answer the same, as for his keeping the peace in the mean time towards all the citizens of this commonwealth, and especially towards the said A. I. hath refused so to do : These are therefore to command you the said constable to convey the said A. O. forthwith to the jail of the said county, and deliver him to the keeper thereof ; and you the said jailor are also hereby required to receive the said A. O. into your jail and custody, and him safely keep, until he find such sureties as aforesaid, or be otherwise delivered by due course of law. Given under my hand and seal, &c.

*(D) Indictment for a common assault.*

County, to wit :

The jurors for the county aforesaid upon their oath *present*, that A. O. of the said county, labourer, on the       day of       , in the year       , with force and arms, at the county aforesaid, in and upon one A. I. taylor, in the peace of God and of the said commonwealth then and there being, did make an assault ; and him the said A. I. then and there did beat, wound, and ill-treat, so that his life was greatly despaired of ; and other wrongs to the said A. I. then and there did, to the great damage of the said A. I. and against the peace and dignity of the commonwealth.

*Note.* In indictments for assault and battery, and other offences not capital, the court may, for good cause shewn, rule the prosecutor to security for costs ; and, on failure, may dismiss the indictment with costs. 1 *Rev. Code* 106.

*Note also.* That the name, addition, and residence of the prosecutor must be written at the foot of every information or indictment for trespass or misdemeanor, before they are filed or sent to the grand jury ; (1 *Rev. Code*, p. 105. s. 24) ; unless the information be filed by express order of court, or the indictment be founded on a previous presentment of the grand jury, made either on their own knowledge, or the information of any two of their own body. *Ibid.* 431.

*(E) Indictment for assaulting a constable in the execution of his office.*

County, to wit :

The jurors for the county aforesaid upon their oath *present*, that A. O. of the said county, labourer, on the       day of       , in the

year , with force and arms, at the county aforesaid, in and upon one A. I. (then being one of the constables of the parish, or precinct, or district) of , in the said county of , in the peace of God and of the said commonwealth, and in the due execution of his said office, then and there also being) did make an assault, &c. and him the said A. I. then and there did beat, wound, and ill-treat, so that his life was greatly despaired of; and other wrongs to the said A. I. then and there did, to the great damage of the said A. I. and against the peace and dignity of the commonwealth.

*A count for a common assault.\**

“And the jurors aforesaid upon their oath aforesaid do further present,” that A. O. of the said county, labourer, on the day of in the year , with force and arms, at the county aforesaid, in and upon one A. I. taylor, in the peace of God and of the said commonwealth then and there being, did make an assault; and him the said A. I. then and there did beat, wound, and ill-treat, so that his life was greatly despaired of; and other wrongs to the said A. I. then and there did, to the great damage of the said A. I. and against the peace and dignity of the commonwealth.

*(F) Indictment for an assault, with intent to ravish.*

County, to wit:

The jurors for the county aforesaid upon their oath *prescript*, that A. O. of the said county, labourer, on the day of , in the year , with force and arms, at the county aforesaid, in and upon one A. I. taylor, in the peace of God and the said commonwealth then and there being, did make an assault, and her the said A. I. then and there did beat, wound, and ill-treat, so that her life was greatly despaired of, with an intent her the said A. I. *against her will*, † then and there *feloniously to ravish and carnally know*; and other wrongs to the said A. I. then and there did, to the great damage of the said A. I. and against the peace and dignity of the commonwealth. (*Add a count for a common assault, as in form E.*)

\* In this, and all cases of a similar nature, it is necessary to add a count for a common assault, in order that if the proof should not support the special count, it may the common; for the jury may find the prisoner guilty only of the common count, if the special be not fully proved; but if it be, then they find guilty generally. *Gr. cir. comp.* 134.

† The words *against her will* to be left out, if the female be under ten years old, because at that age she is presumed not to consent; and instead of the other words in *italics*, say, “unlawfully and feloniously carnally to know and abuse.”

(G) *Indictment for an assault and false imprisonment.*

County, to wit :

The jurors for the county aforesaid upon their oath *present*, that A. O. of the said county, labourer; on the       day of       , in the year       , with force and arms, at the county aforesaid, in and upon one A. I. taylor, in the peace of God and of the said commonwealth then and there being, did make an assault; and him the said A. I. then and there did beat, wound, and ill-treat, so that his life was greatly despaired of; and him the said A. I. then and there unlawfully and injuriously, against the will and without the consent of the said A. I. and also against the laws of this commonwealth, without any legal warrant, authority, or justifiable cause whatsoever, did imprison and detain for a long time; to wit, for the space of       hours then next following; and other wrongs to the said A. I. then and there did, to the great damage of the said A. I. and against the peace and dignity of the commonwealth. (*Add a count for a common assault as in form E.*)

(H) *For an assault, false imprisonment, and obtaining a sum of money for discharging.*

County, to wit :

The jurors for the county aforesaid upon their oath *present*, that A. O. of the said county, labourer, on the       day of       , in the year       , with force and arms, at the county aforesaid, in and upon one A. I. taylor, in the peace of God and of the said commonwealth then and there being, did make an assault; and him the said A. I. then and there did beat, wound, and ill-treat, so that his life was greatly despaired of; and him the said A. I. then and there unlawfully and injuriously, against the will and without the consent of the said A. I. and also against the laws of this commonwealth, without any legal warrant, authority, or justifiable cause whatsoever, did imprison and detain for a long time, to wit, for the space of       hours then next following; "and until he the said A. I. had paid to him the said A. O. the sum of       , of the monies of him the said A. I. for his enlargement;" and other wrongs to the said A. I. then and there did, to the great damage of the said A. I. and against the peace and dignity of the commonwealth. (*Add a count for a common assault as in form E.*)

(I) *For the like, and obtaining a note for discharging.*

County, to wit :

The jurors for the county aforesaid upon their oath *present*, that A. O. of the said county, labourer, on the       day of       , in the year       , with force and arms, at the county aforesaid, in and upon one A. I. taylor, in the peace of God and of the said commonwealth then and there being, did make an assault; and him the said A. I. then and there did beat, wound, and ill-treat, so that his life was greatly despaired of; and him the said A. I. then and there unlawfully and injuriously, against the will and without the consent of the said A. I. and also against the laws of this commonwealth, without any legal

warrant, authority, or justifiable cause whatsoever, did imprison and detain for a long time, to wit, for the space of        hours then next following; "and until he the said A. I. for his deliverance from the said imprisonment, had signed and given to the said A. O. a note under the hand of the said A. I. whereby he the said A. I. promised to pay the said A. O. the sum of       , of the monies of him the said A. I. for his enlargement;" and other wrongs to the said A. I. then and there did, to the great damage of the said A. I. and against the peace and dignity of the commonwealth. (*Add a count for a common assault as in form E.*)

Indictments for assaults may be drawn in a great variety of instances, stating an *intent* to commit some other unlawful act by way of aggravation.

## ATTACHMENTS.

Under this title will be discussed the proceedings on attachments against *absconding debtors*, only. Attachments considered as *process* of the court, also for *contempts* to the court, and *foreign attachments* or proceedings against absent defendants do not fall within the plan of this publication.

### I. OF ATTACHMENTS, WHERE THE DEBTOR IS REMOVING PRIVATELY, OR ABSCONDS AND CONCEALS HIMSELF, SO THAT THE ORDINARY PROCESS OF LAW CANNOT BE SERVED ON HIM:

1. By the laws of Virginia (1 *Rev. Code*, p. 116. sect. 6.) it is enacted, that "If any person shall make complaint to any justice of the peace, that his debtor is removing out of the county or corporation privately, or absconds or conceals himself, so that the ordinary process of law cannot be served on him, such justice shall grant an attachment (A) against the estate of such debtor, or so much thereof, as shall be sufficient to satisfy the debt and costs of such complainant; which attachment, *where the debt or demand shall exceed five dollars, or two hundred pounds of tobacco* \* shall be returnable to the next county or corporation court, and directed to and served by the *sheriff* or his *under sheriff*, † unless in case where the sheriff is a party interested,

\* By act of 1800 (1 *Rev. Code*, p. 405) the jurisdiction of a single magistrate was generally extended to cases, *where the cause of action did not exceed ten dollars*; by act of 1806 (2 *Rev. Code*, p. 114) the jurisdiction is extended in cases of debt, detinue, and trover, to twenty dollars, with a *proviso*, "that no justice of the peace shall take cognizance of any attachment where the sum demanded shall not exceed ten dollars." From these laws, it seems evidently to have been the intention of the legislature to give a single magistrate final jurisdiction in cases of attachment as far as ten dollars.

† By act of 1800 (2 *Rev. Code*, p. 5, sect. 2) it is enacted that "*ANY process of attachment against absconding debtors, or against a tenant or tenants for rent under any lease or other contract, may hereafter be executed and returned by a constable, in the same manner as by law sheriffs are directed to execute and return the same.*"

and then, the same shall be directed to and served by a coroner or serjeant ; and it shall be lawful for such sheriff or officer to serve and levy the same, upon the slaves, goods and chattels of the party absconding, wherever the same shall be found, or in the hands of any person or persons indebted to, or having any effects of the party absconding, and to summon such garnishee or garnishees to appear at the next court to be held for the said county or corporation, there to answer, upon oath, what he or she is indebted unto such party, and what effects of such party he or she hath in his or her hands, or had at the time of serving such attachment ; which being returned executed, the court may thereupon compel such garnishee to appear and answer as aforesaid." (*See Post. No. 10.*)

2. (2 *Rev. Code*, p. 99. sect. 2) " Whenever the plaintiff in any attachment shall alledge that any garnishee, summoned in such attachment, hath not discovered the true amount of debts due from him to the defendant, or what goods and chattels belonging to the defendant are in his possession, the court shall direct, without the formality of pleading, a jury to be impanelled immediately (unless good cause be shewn by either party for a continuance) to inquire what is the true amount due from such garnishee to the defendant, and what goods and chattels are in his possession belonging to the defendant. If the finding of the jury shall be against such garnishee, the court shall grant judgment in the same manner as if the facts found by the jury had been confessed by him on his examination ; and if the jury find in his favour, he shall recover his costs against the plaintiff."

3. (1 *Rev. Code*, p. 116. sect. 7.) " Every justice of peace, before granting such attachment, shall take bond (B) and security of the party for whom the same shall be issued, in double the sum to be attached, payable to the defendant, for satisfying and paying all costs which shall be awarded to the said defendant, in case the plaintiff suing out the attachment therein mentioned shall be cast in his suit, and also all damages which shall be recovered against the said plaintiff for his suing out such attachment ; which bond shall be by the same justice returned to the court to which the attachment is returnable ; and the party entitled to such costs or damages may thereupon bring suit, and recover, and every attachment issued without such bond taken, or where no bond shall be returned, is declared illegal and void, and shall be dismissed."

4. (*Ibid.* sect. 8.) " All attachments shall be repleviable by appearance, and putting in good bail, if by the court ruled so to do, or by giving bond with good security to the sheriff (C) or other officer serving the same ; which bond the sheriff or other officer is empowered to take, to appear at the court to which such attachment shall be returnable, and to abide by and perform the order and judgment of such court."

5. (*Ibid.* sect. 9.) Upon the defendant or defendants replevying any attached effects, by giving bond and security to the sheriff or other officer as aforesaid, the sheriff shall return the name of the security by him so taken ; and if such security shall be adjudged insufficient by the court, and if the defendant shall fail to appear and give

special bail, if thereunto ruled by the court, such sheriff and security shall be subject to the same judgment and recovery, and have the same liberty of defence and relief, as if such security had been taken upon the execution of mesne process."

6. (2 Rev. Code, p. 99. sect. 4.) "In all cases of attachments, the defendant shall be admitted to make defence, and any other person claiming the property attached may interplead, without giving bail: *provided*, that the property attached shall not thereby be replevied."

7. (*Ibid.* sect. 3.) "Whenever the goods and chattels taken by virtue of any attachment shall be claimed by any person, other than such debtor, the court shall immediately (unless good cause be shewn by either party for a continuance) direct a jury to be impannelled, to inquire into the right of property; (D) and in all cases where the jury find for the claimant, such claimant shall be entitled to costs; and where the jury find for the plaintiff in the attachment, such plaintiff shall recover his costs against the claimant."

(A) *Warrant of attachment*: (On sect. 6. of 1 Rev. Code, p. 116.)

County, to wit:

To the sheriff or constable \* of the said county.

Whereas A. C. hath this day complained before me J. P. a justice of the peace for the said county, that B. D. is indebted to him in the sum of            with interest thereon from the            day of           , and that the said B. D. is removing out of the said county privately (or absconds, or conceals himself) so that the ordinary process of law cannot be served upon him: These are therefore, in the name of the commonwealth, to require you to attach the estate of the said B. D. or so much thereof as shall be of value sufficient to satisfy the said sum of           , together with *interest* † thereon from the            day of           , and the costs; and such estate so attached in your hands to secure, or so to provide that the same may be liable to further proceedings thereon to be had at the next court to be held for this county; and that you then and there make returns how you have executed this warrant. Given under my hand, &c.

(B) *Bond to be executed by the party for whom an attachment is issued, previously to granting it*: (under sect. 7. of 1 Rev. Code, p. 116.)

Know all men by these presents, that we A. C. and A. S. are held and firmly bound to B. D. in the sum of            of lawful money of Virginia, to be paid to the said B. D. his certain attorney, his executors,

\* See note 2 ante. pa           , by which it appears that *any* process of attachment may be served by a constable.

† It has been decided that the court cannot give judgment for *interest*, unless it be demanded in the attachment. See 3 Call. 455.

administrators or assigns; for the true payment whereof we bind ourselves jointly and severally, our joint and several heirs, executors, and administrators, firmly by these presents. Sealed with our seals, and dated this       day of       in the year of our lord       .

The condition of the above obligation is such, that whereas the above bound A. C. hath this day obtained from J. P. a justice of the peace for the county of       , an attachment against the estate of the above named B. D. for the sum of       , returnable to the next county court; if therefore the said A. C. shall satisfy and pay all costs which shall be awarded to the said B. D. in case the said A. C. shall be cast in the said suit, and also all damages which shall be recovered against the said A. C. for his suing out this attachment; then the above obligation to be void, else to remain in full force.

Signed, sealed and delivered, before

**(C) Bond to the sheriff or officer \* levying an attachment:**  
(On sect. 8 of 1 Rev. Code, p. 116.)

Know all men by these presents, that we B. D. and B. S. are held and firmly bound to A. S. sheriff of the county of       , (or coroner, or constable, as the case may be) in the sum of       current money of Virginia, to be paid to the said A. S. his certain attorney, his executors, administrators or assigns; for the true payment whereof we bind ourselves jointly and severally, our joint and several heirs, executors and administrators, firmly by these presents. Sealed with our seals, and dated this       day of       , in the year       .

The condition of the above obligation is such, that whereas an attachment from J. P. a justice of the peace for the county of       , against the estate of the above bound B. D. hath been levied upon sundry goods and chattels of the said B. D. by D. S. a deputy for A. S. sheriff of the county of       (or A. C. coroner, or constable) which have been restored to him the said B. D. upon his entering into this bond, with security as the law directs; if therefore the said B. D. shall appear at the next court to be held for this county, and answer to the said attachment, and abide by and perform the order and judgment of the said court thereupon, then, &c.

**(D) Interpleader, where the property attached is claimed by another person:** (On sect. 3. of 2 Rev. Code, p. 99.)

A. C. }

v. }

Upon an attachment, issued by J. P. a justice of the peace for the county of       , against the estate of the said B. D. at the suit of the said A. C.:

\* As this bond is conditioned for the appearance of the party at court, and operates in every respect as a bail bond, it seems on principle that it ought to be made payable to the officer who levies the attachment. And although the original law only speaks of the *sheriff or other officer* (at that time the coroner) yet, as a subsequent law has given power to *constables* to serve any attachments, there is the same propriety in making the bond payable to them.



G. I. by C. F. his attorney, comes, and as well at the suit of the said A. C. as at the suit of the said B. D. defends the wrong and injury, &c. when, &c. and saith, that on the            day of            in the year            at the county of           , an attachment from J. P. a justice of the peace for the county aforesaid, was issued against the estate of the said B. D. directed to the sheriff of           , (or coroner, or constable, as the case is) by virtue whereof a certain A. S. sheriff, or coroner or constable, as the case may be, did, on the            day of            at the county of            levy the said attachment on divers goods, and chattels, to wit, (here describe the property) as and for the goods and chattels of the said B. D. And the said G. I. in fact saith that neither at the time of issuing nor of levying the said attachment, in manner and form aforesaid were the said goods and chattels, or any part thereof, the property of the said B. D. but on the contrary the same, and every of them, were the proper goods and chattels of the said G. I. to wit, at the county aforesaid; and this he is ready to verify. Wherefore he prays judgment whether the court will grant judgment and award execution, directing a sale of the said goods and chattels as the property of the said B. D. to satisfy the said A. C. of his debt and costs in the said attachment mentioned.

*(E) Replication to the above plea.*

And the said A. C. saith, that he, by reason of any thing by the said B. D. above in pleading alledged, ought not to be precluded from having judgment and execution thereon, directing a sale of the goods and chattels in the plea of the said B. D. mentioned, because he saith that at the time of issuing and of levying the said attachment, the said goods and chattels, and every part thereof, were the proper goods and chattels of the said B. D. and not of the said G. I. and this he prays may be inquired of by the country, &c.

**II. WHERE THE CREDITOR HAS GROUNDS TO SUSPECT THAT HIS DEBTOR INTENDS TO REMOVE HIS EFFECTS: AND THE DEBT DOTH NOT EXCEED TWENTY DOLLARS, OR ONE THOUSAND POUNDS OF TOBACCO.**

8. (1 Rev. Code, p. 116. sect. 10.) "Any creditor, where his debt doth not exceed twenty dollars, or one thousand pounds of tobacco, may go before any justice of the peace of the county or corporation where his debtor resides, and make oath how much is justly due to him, and that he hath grounds to suspect, and verily believes that such debtor intends to remove his effects; and thereupon such justice shall issue an attachment (F) against the estate of such debtor, returnable to his next county or corporation court, directed to all sheriffs, serjeants, and constables within the commonwealth; and by virtue thereof it shall be lawful as well for the sheriff, serjeant, or any constable of the county or corporation, where such attachment shall be

obtained, as for the sheriff, serjeant, or any constable of other counties or corporations, to pursue and seize such effects, and to make return of such attachment to the court where the same shall be returnable; and thereupon such proceedings shall be had without a petition, as in other cases of attachments."

(F) *Warrant of attachment*: (On sect. 10. of 1 Rev. Code, p. 116.)

County, to wit:

To all sheriffs, serjeants and constables within the commonwealth of Virginia.

Whereas A. C. of, &c. hath this day complained and made oath before me I. P. a justice of the peace for the county aforesaid, that C. D. of the same county, is justly indebted to him in the sum of \_\_\_\_\_, (*by obligation, account, &c. as the case may be*) with interest thereon from the \_\_\_\_\_ day of \_\_\_\_\_ &c. and that he the said A. C. hath grounds to suspect and verily believes, that the said B. D. intends to remove his effects: These are therefore, in the name of the commonwealth, to require you, and every of you, within your respective counties, corporations, and precincts, to pursue and seize the effects of the said B. D. or so much thereof as will be sufficient to satisfy the said debt, with interest thereon as aforesaid, and costs; and the same in your hands to secure, or so to provide that the same may be liable, upon further proceedings thereon to be had at the next court to be held for the said county of \_\_\_\_\_, to which you are to make return how you have executed this warrant. Given under my hand, &c.

### III. WHERE THE DEBT DOES NOT EXCEED TEN DOLLARS, OR TWO HUNDRED POUNDS OF TOBACCO.

9. (1 Rev. Code, p. 117. sect. 11.) Upon complaint made to a "justice of peace, that any person indebted to the complainant *in any less sum than five dollars,\** or two hundred pounds of tobacco, is removing out of the county or corporation privately, or so absconds or conceals himself that a warrant cannot be served upon him, such justice shall, taking bond and security, as in this act is before directed (*antea*, No. 3.) grant an attachment (G) against the estate of such debtor, or so much thereof, as shall be sufficient to satisfy the debt and costs of the party praying such attachment, directed to the sheriff, or any constable of his county, or serjeant or any constable of his corporation, and returnable before himself, or any other justice thereof, who shall and may proceed thereupon, as upon an attachment returnable to the county or corporation court."

\* Extended to ten dollars. See *antea*, p. 84, note \*

(G) *Warrant of attachment*: (On sect. 11. of 1 Rev. Code, p. 117.)

to wit :

To the sheriff, or any constable of the said county, (or *serjeant, &c.* of the said corporation, as the case may be.)

Whereas A. C. hath this day made complaint before me I. P. a justice of the peace for the county aforesaid, that B. D. is indebted to him in the sum of \_\_\_\_\_, with interest thereon from the \_\_\_\_\_ day of \_\_\_\_\_ &c. and that the said B. D. is removing out of the said county privately (or so absconds, or conceals himself) that a warrant cannot be served upon him : I therefore command you to attach the estate of the said B. D. or so much thereof as shall be of value sufficient to satisfy the said debt, together with interest thereon as aforesaid, and the costs, and the same in your hands to secure, so as to be liable to further proceedings thereon to be had according to law ; and that you make return before me, or some other justice of the peace for this county, how you have executed this warrant. Given, &c.

✎ The bond may be the same as *antea*, form (B) except that in the condition, instead of saying "*returnable to the next county court,*" you say, "*returnable before I. P. or some other justice of the peace for the county of \_\_\_\_\_,*" &c.

#### IV. OF MATTERS COMMON TO ALL THE FOREGOING SPECIES OF ATTACHMENTS.

10. (1 Rev. Code, p. 117. sect. 12.) If any attachment returnable to the county or corporation court, or before a justice of peace, shall be returned executed, and the goods or effects attached shall not be replevied as this act directs [*see ante*, No. 4.] the plaintiff shall be entitled to a judgment for his whole debt, and may take execution thereupon ; and all goods and effects attached and not replevied, as aforesaid, shall be sold and disposed of, for and towards satisfaction of the plaintiff's judgment, in the same manner as goods taken in execution upon a writ of *fieri facias*. And where any attachment shall be returned served in the hands of any garnishee, it shall be lawful, upon his or her appearance and examination in the manner by this act before directed [*see ante*, No. 1.] to enter up judgment and award execution against every such garnishee or garnishees, for all sums of money due from him, her, or them, to the person absconding, or in his, her, or their custody or possession, for the use of such person, or so much thereof as shall be of the value sufficient to satisfy the debt and costs of the complainant ; and all goods and effects whatsoever, in the hands of any garnishee or garnishees, belonging to such absconding person, shall be liable to satisfy such judgment."

11. ✎ By the attachment law (1 Rev. Code, p. 117. sect. 13.) the officer levying an *attachment* on live stock was bound to furnish it with

sustenance; the expence of which was to be adjusted by the court, and taxed in the bill of costs against the party who was cast. The same principle was adopted, in relation to *executions*. (See 1 *Rev. Code*, p. 299. sect. 20.) Afterwards a specific sum was allowed for slaves, and live stock, respectively, which operated alike in every part of the state. (See 1 *Rev. Code*, p. 325. sect. 10.) But this being deemed unreasonable, in as much as the means of sustenance was liable to fluctuate with the different seasons of the year, and was of different value in various parts of the commonwealth, the legislature, at the session of 1806 (see 2 *Rev. Code*, p. 134. sect. 2.) passed an act, making it the duty of the county and corporation courts annually, in the months of *May and October*, to settle and adjust the compensation to be allowed to sheriffs and other officers, for slaves and live stock taken by attachment or execution; provided, that for a *slave* the allowance should not exceed twenty cents per day; for a *horse*, or *mule*, seventeen cents; for each head of horned cattle, or hog, nine cents; for each sheep, or goat, six cents.

12. (1 *Rev. Code*, p. 117. sect. 14) "upon proof being made before a magistrate, that a debtor is actually moving or absconding on a *Sunday*, it shall be lawful to issue and serve an attachment against such debtor, as is directed on any other day."

#### V. WHERE THE CREDITOR SUSPECTS HIS DEBTOR WILL REMOVE BEFORE THE DEBT WILL BE PAYABLE, OR WHERE HE HAS REMOVED, LEAVING EFFECTS.

13. (2 *Rev. Code*, p. 98. sect. 1.) "Whenever any creditor whose claim amounts to ten dollars, or four hundred pounds of tobacco shall have sufficient grounds to suspect that his debtor will remove with his effects out of this commonwealth, before his debt will be payable, or whenever such debtor shall have so removed, leaving effects, it shall be lawful for such creditor to go before any magistrate of the county or corporation where his debtor resides, or, in case such debtor has so removed, where he last resided, or where his effects may be found, and make oath to the true amount of his debt, and the time when it will be payable, and that he has just cause to suspect and verily believes that such debtor will remove himself, with his effects, out of the commonwealth, before the said debt will become payable, or hath actually so removed; and also that he had no knowledge, when the said debt was contracted, of the intention of such debtor so to remove: and thereupon, such magistrate, taking bond and security from the creditor, as in other cases of attachments, shall issue an attachment (H) (I) against the goods and chattels of the debtor, returnable at the next court to be holden for such county or corporation; which attachment may be served on any goods and chattels of such debtor, or on any garnishee or garnishees. If such debtor shall not, on or before the return of such attachment, enter into bond with sufficient re-  
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ty for the payment of the said debt, when it will become due, the court, on due proof of the justice thereof, and of the intention of the debtor to remove, or of his having actually removed out of this commonwealth, shall grant judgment as in other cases of attachments : but execution shall be stayed against any garnishee, who shall state he is indebted, or will, at a future day be indebted to the defendant, until the claim of the plaintiff or such garnishee's debt to the defendant shall become due ; and the goods condemned shall be sold on a credit until the time when the plaintiff's claim shall be payable. The sheriff or other officer selling such goods, shall take a bond or bonds (K) with good security, from the purchaser or purchasers, and assign the same to the plaintiff, to the amount of his debt, interest and costs ; and where the property sold shall amount to more than the debt, interest and costs, shall take a bond (L) with good security for the surplus, and assign the same to the defendant : *Provided always*, That not more of the goods attached shall be sold than shall be necessary to satisfy the debt, interest and costs, except in cases where the property sold cannot be divided. In such cases, the sheriff or other officer shall be entitled to commissions only on the amount of the plaintiff's demand ; which commissions shall be included in the bond or bonds assigned to such plaintiff, who shall be liable therefor as for commissions included in a forthcoming bond taken by virtue of an execution : *Provided also*, That all such attachments shall be replevable in the same manner as other attachments are by law replevable. Where any such debt shall be less than ten dollars, or four hundred pounds of tobacco, an attachment may be obtained as aforesaid (N) returnable before any magistrate of the county or corporation, who shall and may grant judgment thereupon, and direct the goods condemned by him to be sold in manner aforesaid, or execution to be stayed as aforesaid against any garnishee or garnishees."

(H) *Warrant of attachment, where the creditor suspects his debtor will remove before the debt is payable.*  
(On sect. 1 of 2 Rev. Code, p. 98.)

to wit :

To the sheriff or constable of the said county.

Whereas A. C. hath this day made oath before me, I. P. a justice of the peace for the county, aforesaid ; that B. D. of the said county, will be indebted to him in the sum of \_\_\_\_\_, on the \_\_\_\_\_ day of \_\_\_\_\_ next, by virtue of, &c. (*here describe the nature of the debt, whether by account, bond, bill, note, &c.*) and that he hath just cause to suspect and verily believes that the said B. D. will remove himself, with his effects, out of this commonwealth, before the said debt will become payable, and that he the said A. C. had no knowledge, when the said debt was contracted, that the said B. D. had any intention so to remove with his effects : These are therefore to require you to attach the goods and chattels of the said B. D. or so much thereof as

will be of value sufficient to satisfy the said debt and costs; and such estate, so attached, in your hands to secure, or so to provide, that the same may be liable to further proceedings thereon to be had\* at the next court to be holden for the said county of , when and where you are to make return how you have executed this warrant.

(I) *Warrant of attachment, where the debtor has removed, before the debt became payable:* (under the above law.)

to wit:

To the sheriff or constable of the said county.

Whereas A. C. of hath this day made oath before me, J. P. a justice of the peace for the county aforesaid, that B. D. late of the county of , will be indebted to him in the sum of , on the day of next, by virtue of &c. (*here describe the nature of the debt, whether by account, bond, bill, note, &c.*) and that the said B. D. hath removed himself out of this commonwealth, leaving effects, in the county of , before the said debt became payable, and that he the said A. C. had no knowledge when the said debt was contracted that the said B. D. had any intention so to remove: These are therefore to require you to attach the goods and chattels of the said B. D. or so much thereof as will be of value sufficient to satisfy the said debt and costs; and such estate, so attached, in your hands to secure, or so to provide, that the same may be liable to further proceedings thereon to be had at the next court to be holden for the said county of , when and where you are to make return how you have executed this warrant.

For the form of the bond to be taken previously to granting the attachment; see *antea*, form (B.)

(K) *Bond to be taken on the sale of the attached effects.*


(The penal part of the bond may be the same as *antea*, form (C) being payable to the sheriff or officer selling the goods, with the following condition:)

"The condition of the above obligation is such, that whereas A. C. hath sued out of the county court of a writ of *feri facias* against the goods and chattels of B. D. grounded on a judgment of the said court upon an attachment; which writ, with the legal costs, and sheriff's (or other officer's) commissions attending the execution of the same, amounts to the sum of ; and by the said writ the said sheriff (or other officer) is commanded to sell the attached effects of the said B. D. on a credit, until the day of in the year , to satisfy the debt and costs aforesaid; and now at this day, the above bound E. P. (*the purchaser*) at a sale of the said attached effects, became the purchaser, as the highest bidder, of \* sundry of the said

goods and chattels, amounting to the sum of       ; if therefore the said E. P. his executors or administrators, shall well and truly pay to the said (*sheriff or other officer*) the said sum of       , on or before the day of       in the year       , then the above obligation to be void, else to remain in full force.

*Signed, sealed, &c.*


This bond is to be immediately assigned by the sheriff or officer to the plaintiff.

 In entering up the judgment of the court, it should always be stated on what credit the attached effects are to be sold, which should be endorsed on the execution.

**(L) *Bond for the surplus, where the property sold cannot be divided.***


(If the property be a specific thing, as a slave, a horse, &c. and consequently cannot be divided, the bond may pursue the form (K) till you come to this mark \* in the condition; then say :) "a certain negro slave named       , (*or a horse, &c.*) at the price of       , which amounts to the sum of       more than the demand of the said A. C. including *interest*, costs and sheriff's (*or other officer's*) commissions on the said demand; if therefore the said E. P. his executors or administrators, shall well and truly pay to the said (*sheriff or other officer*) the said sum of       (*the surplus*) then, &c.

This bond must be immediately assigned by the sheriff or officer to the defendant.

 In the above case, the *sheriff's* or other *officer's* commissions are to be included in the bond taken for the *demand* of the plaintiff, but not in the bond for the surplus. The word *interest* cannot properly be introduced, except when judgment is rendered against a garnishee, whose debt to the defendant is postponed beyond the time when the plaintiff's demand will become payable.


**(M) *Bond for the plaintiff's demand, where the property sold cannot be divided.***

(Pursue form (K) till you come to this mark \* in the condition, then say :) "a certain negro slave named       , (*or a horse, &c.*) at the price of       ; and the demand of the said A. C. including interest costs and sheriff's (*or other officer's*) commissions, amounting to the sum of       , this bond hath been taken for the same pursuant to law; if therefore the said E. P. his executors or administrators, shall well and truly pay to the said (*sheriff or other officer*) the said sum of       (*the plaintiff's demand, including costs, and commissions, and interest, where it is properly demandable*) then, &c.

 If the judgment and execution be against a garnishee, the recital of the bond must be varied accordingly, so as to mention that circumstance.

(N) *Warrant of attachment, where the debt is less than ten dollars, or four hundred pounds of tobacco: (On sect 1, of 2 Rev. Code, p. 98.)*

(This attachment is finally cognizable before a single magistrate; and the above forms (H) and (I) may be used, only observing in the conclusion to omit from this mark \*, and instead thereof, say;) "before me or some other magistrate of the said county (or corporation, as the case may be) to whom you are to make return how you have executed this warrant."

 The bonds to be taken on the sale of property, by virtue of an execution from a magistrate, may be the same as prescribed in forms (K) (L) (M) with this difference, that instead of saying the plaintiff "hath sued out a writ of *feri facias*, &c." you say, "hath obtained an execution from J. P. a justice of the peace for the county of &c." and in the subsequent parts of the bond, instead of saying "writ," you say "execution."

## VI. RETURNS, IN CASES OF ATTACHMENTS.

(O) *Where there are no effects.*

"The within named B. D. hath no effects, within my bailiwick, (or precinct) whereof I can make the sum within mentioned.  
D. S. deputy for H. S. sheriff of or A. C. constable.

(P) *Where the attachment is levied.*

"By virtue of the within warrant to me directed, I have attached (describe the property) of the goods and chattels of the within named B. D. which I have ready, as by the said warrant I am directed."  
(Subscribed as in form 1.)


(Q) *Where attached in the hands of a garnishee.*

"By virtue of &c. I have attached the within mentioned sum of , with interest and cost, of the estate of the within named B. D. in the hands of E. G. as by the warrant I am required; and have summoned the said E. G. to appear, &c. (either before a justice, or at the next court for the county of , as the case may be) to declare what effects he hath in his hands belonging to the said B. D. or how much he is indebted to him."



*(R) Where the property is sold under an execution.*

"By virtue of the within precept, I have caused to be made of the goods and chattels of the within named B. D. the sum of , which I have ready to satisfy &c." (Or where the property is sold on credit, as authorised under the preceding head, No. V. the truth of the case is to be returned).

 In practice the above forms are much abbreviated. Thus the return under form (O) would be, "*No effects.*" Form (P) "*Levied on .*" Form (Q) "*Attached in the hands of E. G. and summoned him as a garnishee.*" Form (R) "*Ready to satisfy.*"

## VII. JUDGMENTS ON ATTACHMENTS BEFORE A MAGISTRATE.

*(S) Where the defendant fails to appear.*

to wit :

A. C. against B. D. upon an attachment.

The attachment obtained by the plaintiff against the estate of the defendant, in this cause, being returned executed before me, J. P. a justice of the peace for the county aforesaid, \* and the said defendant having failed to appear ; \* the plaintiff proved his debt according to law : it is therefore considered that the said A. C. recover against the said B. D. the sum of , with interest from &c. and the costs amounting to .

*(T) Judgment, upon a hearing.*

(As in the above form (S) omitting what is between the asterisks, and instead thereof saying) "and the said B. D. appearing, and being fully heard in his defence." (Conclude as above.)

*(V) Where the attachment is levied in the hands of a garnishee.*

to wit :

A. C. against B. D. upon an attachment.

The attachment obtained by the plaintiff against the estate of the defendant, in this cause, being returned executed in the hands of E. G. and it appearing to me that there is now in the hands of the said E. G. of the estate of the said B. D. (or, that the said E. G. is indebted to the said B. D.) sufficient to satisfy the plaintiff's debt, with interest and costs ; and the said plaintiff having before me proved his debt aforesaid ; it is considered that the said A. C. recover against the said E. G. the sum of , with interest thereon, from, &c. together with the costs, amounting to .

*(W) Judgment for the defendant.*

to wit :

A. C. against B. D ; upon an attachment.

The attachment obtained by the plaintiff against the defendant being returned executed, and the parties having this day appeared before me, and been fully heard, it is considered that the plaintiff take nothing by his plea; that the estate of the defendant attached at the suit of the plaintiff be restored; and that the plaintiff pay to the defendant his costs expended in his defence, amounting to

*(X) Execution upon a judgment, in attachment.*

The commonwealth of Virginia, to E. C. constable of                      district,  
in the county of                      , greeting :

You are hereby commanded, that of the goods and chattels of B. D. late in your district, you cause to be made the sum of                      , which A. C. lately before J. P. a justice of the peace for the said county hath recovered against him \* for debt, on an attachment, or as garnishee on an attachment sued out by the said A. C. against B. D ; together with                      which to the said A. C. before the same justice, were adjudged for his costs, in that behalf expended, whereof the said B. D. is convict, as appears by the judgment of the said J. P ; and that you have the same before the said justice, on the                      day of                      next, to render to the said A. C. of the debt and costs aforesaid ; and have then there this precept. Witness the said J. P. at the county aforesaid, the                      day of                      in the year of our Lord                      , and in the                      year of the commonwealth.

*(Y) Execution for costs.*

(As in the above form (X) till you come to the asterisk \*, then say,) "for his costs by him expended about his defence, on an attachment, at the suit of the said A. C. which to the said B. D. were adjudged by the said J. P. as appears by the judgment of the said J. P ; and that you have the same before the said justice on the                      day of                      next, to render to the said B. D. of the costs aforesaid ; and have then there this precept. Witness, &c. (as above.)"

☞ If the execution be grounded on a judgment of the justice who issues the execution, and be returnable before him, the above forms may be varied to suit the case.

## VIII. ADJUDGED CASES, ON ATTACHMENTS.

14. An attachment against an absconding debtor can only issue from the county where he resided, or is actually found, at the time of issuing it. 3 *Call*. 413.

15. As distress for rent cannot be made off the demised premises, an attachment at the suit of a creditor against the tenant as an absconding debtor, served upon property found off the premises, will be preferred to the landlord's claim for rent. 3 *Call*. 439.

16. If the warrant of attachment demand only the principal sum and costs, the court cannot give judgment for interest. 3 *Call*. 415.

17. Where the attachment is levied in the hands of a garnishee, judgment should be first entered against the absconding debtor, and then the garnishee should be ordered to pay it. *Ibid*.

18. An attachment (prior to the act of January 1806) ought not to have been granted, on the ground that the debtor *intended* to remove his effects, or *would* elude the ordinary legal process; but only on the ground that he was actually removing out of the county or corporation privately, or absconded or concealed himself, so that the ordinary process of law could not be served upon him. 2 *H. and M.* 308.

19. The complaint on which an attachment is issued, and the bond and security for its due prosecution, ought to be made and given by the creditor himself, and not by his *attorney at law*. *Ibid*.

20. An attachment irregularly issued ought to be quashed, *ex officio*, by the court to which it is returned; though bail be not given, nor any plea filed by the defendant; and in like manner, the court ought to quash it, on errors in arrest of judgment, after pleadings and a verdict for the defendant. *Ibid*.

21. A plea in abatement to an attachment ought not to conclude with praying judgment, if the plaintiff ought to have and maintain his *action*, but only that the attachment be *quashed*. *Ibid*.

22. A plea that the defendant never *absconded* is a plea in abatement. *Ibid*.

Under the attachment law of *Pennsylvania*, which is the same in principle with that of *Virginia*, the following decisions have taken place.

(1) That the partnership credits of a mercantile firm could not be attached to answer the separate debt of one of the partners. 2 *Dallas*, 73, 4. C. P. But it has been since determined in the *Supreme Court*, that a debt due to partners may be attached by a separate creditor of one of the partners, who shall recover a moiety of the amount. 2 *Dall*. 277. See *Wats. L. P.* 72 [98] &c. *as to the liability of partnership effects to execution, for separate demands*. See also 1 *Wash.* 77. 1 *H. and M.* 176, *how far an individual and separate claim may be a set-off against a partnership-demand*.

(2) That a debt in suit may be attached. 2 *Dall.* 277.

(3) That debts may be attached before they are due and payable. 2 *Dall.* 211, 212.

(4) That a fund remitted to pay particular creditors cannot be attached. 4 *Dall.* 279.

## ATTAINER.

This is derived from the Latin word, *attinctus*, stained or blackened. 4 Bl. Com. 480.

In cases of treason or felony, a man is said to be convicted before judgment is pronounced against him, as if a man be convicted by verdict, or his own confession; but he is said to be *attainted*, only after judgment passes on such verdict or confession. 1 Inst. 390.

The penalties consequent on such *attainder*, by the laws of England, were forfeitures of estate, and corruption of blood, so that neither his children nor relations could derive any inheritance through him, nor could his wife claim her dower of his estate. To remedy which inconvenience, as well as to save the necessity of passing a special act of the legislature (which alone could relieve from the penalty) for every case which might occur, it is enacted by the laws of Virginia, that "whosoever any person shall happen to be attainted, convicted, or outlawed of any treason, misprision of treason, murder, or felony whatsoever, there shall in no case be a forfeiture to the commonwealth of dower, or of lands, slaves, or personal estate, but the same shall descend and pass in like manner as is by law directed in case of persons dying intestate; nor shall any *attainder* work a corruption of blood." 1 Rev. Code, 106.

But quere, whether this act extends to the case of a *felon de se*, who is neither convicted nor attainted. See 4 Bl. Com. 480 c. 27.



AWARD.

ALTHOUGH the subject of this title does not come under the consideration of a magistrate as a *conservator of the peace*, yet as cases arising under it may frequently be brought before him in his *judicial capacity*, and as almost every person, may be interested in a know-

ledge of it. I shall treat of the several parts of the doctrine, with some degree of minuteness : Under which I shall shew,

- I. What an award is. II. Who may or may not be arbitrators. III. Who may or may not submit to arbitration. IV. What things may be submitted. V. The extent of the submission. VI. The several kinds of submission. VII. When a submission may be revoked. VIII. Of the award ; when it shall be good, and when not. IX. Of the umpire. X. What shall be a breach of the award. XI. Of the remedy for non-performance. XII. How an award may be relieved against.*

### I. WHAT AN AWARD IS.

An award is the judgment, or decree, of persons elected by the parties, to arbitrate and determine the matters in controversy submitted to them. 1 *Comy. Dig.* "ARBITRAMENT." (A)

### II, WHO MAY OR MAY NOT BE ARBITRATORS.

An arbitrator being a judge elected by the party, every one capable of making an arbitrament may be an arbitrator. 1 *Comy. Dig.* "ARBITRAMENT." (B.)

But a person of *non sane* memory ; a person, who by nature or accident has not discretion ; an infant ; a *feme covert* ; a man attainted of treason or felony ; or a person who is not indifferent with respect to the decision of the cause, cannot be an arbitrator, and in the last mentioned case an award made by such an arbitrator would be set aside in a court of equity. 1 *Comy. Dig.* "ARBITRAMENT." (C.)

### III. WHO MAY OR MAY NOT SUBMIT TO ARBITRATION.

Every one capable of making a disposition, or a release of his right, may make a submission to an award. 1 *Comy. Dig.* "ARBITRAMENT." (D 2.)

But an infant cannot submit to arbitrament, for his submission is void. *Ibid. Kyd. Aw. 35.*

Yet it seems that if an infant and a man of full age join in a submission, it is good ; for though the infant cannot be obliged to stand to it, yet his submission is only voidable, and he may agree or disagree to the award at his full age. *Ibid. But see contra Kyd. Aw. 36. March. 142. 3 Vin. 87.*

And a father may be obliged, *that he and his son, an infant shall stand to an award* : and such obligation binds the father. *Ibid.*

And therefore, if the father pleads to the obligation, *that his son was within age*, it is no bar. *3 Lev. 17.*

So a guardian may submit for an infant his ward, and bind himself that the infant shall perform the award. *Comb. 318. Kyd. Aw. 39. 3 N. Y. Term Rept. 253.*

A *feme covert* cannot submit herself to an award. *1 Com. Dig. 523.*

But the husband may submit *for him and his wife*. *Style 351.*

So, if the husband only submit, it is sufficient for a debt due from the wife as executrix or administratrix ; for the husband is chargeable with it by the intermarriage. *1 Com. Dig. 523.*

So, if there be a submission by the husband only for a lease for years, which his wife has as executrix ; and this binds the wife after his death. *Ibid.*

Or, for a debt upon a bond made to his wife before coverture. *March 77.*

It is a general rule, that those only who are parties to the submission shall be bound by the award. *Kyd. Aw. 42.*

Thus if A submit, for himself and B his partner, all matters, &c. between the partnership and another, A shall be bound, but not B, for he is a stranger to the submission. *2 Mod. 228.*

So, in general, a man is bound by an award to which he submits for another. *Kyd. Aw. 42.*

As, if an attorney, without the express authority of his principal, enter into a bond to a third person, under a condition to be void on performance of the award by the principal, otherwise to be in full force, this shall bind the attorney, and not the principal. *1 Ld. Raym. 246. 1 Salk. 70. Skinn. 679. Carth. 412. Comb. 439. 12 Mod. 129. s. c.*

Yet it is the common understanding, that the assent of the attorney in a cause, to a reference by rule of court, will bind his client. *Kyd. Aw. 45. 1 Dall. 164.*

An executor may submit a controversy, in right of his testator ; but if the award give him less than he would be entitled to at law, he must account for the deficiency. *Kyd. Aw. 39, 40. 3 Leon. 53.*

Where an administrator *expressly* bound himself as administrator, his heirs, &c. to abide by an award to be made touching matters in dispute between his intestate and another, and the arbitrators award that he as administrator should pay, &c. he cannot plead *silene administratoris* to debt on the bond. *1 Term Rept. 691.*

The above case has since been recognized as law, on the principal point, that the administrator by entering into a bond, in wh

bound himself, his heirs, &c. had bound himself *personally*; though the *dictum* of ASHHURST J. in that case, "that it amounted to an admission of assets," has since been overruled.

For it has been held that the mere act of submission by an administrator is not of itself an *admission* of assets; and if the arbitrator simply declares that there is so much due from the intestate's estate to the other party, *without awarding that the administrator shall pay it*, he may notwithstanding plead "fully administered." And the plaintiff in an action of assumpsit against the administrator cannot give in evidence a promise, at the time of the submission, to pay whatever should be found due from the estate of the intestate; for, if there be no assets, the personal promise of the representative is a *nudum pactum*. 5 Term Rep. 6.

But if an arbitrator, under a reference between A. and B an administrator, award that B shall pay a certain sum as the amount of A's demand, B. cannot afterwards object that he had no assets. 7 Term Rep. 453.

Such award, however, will not operate as an admission of assets, in another action, at the suit of any other creditor. *Ibid.*

If one of two executors refer a matter in his own right, and one in right of his testator, and the referees award thereon a sum of money to himself, and another to him and his co-executor, the award is good. 1 Call. 575.

A parent may submit to arbitration a trespass committed upon his infant child; and it shall not vitiate the award, that the damages awarded are blended with other damages belonging wholly to the parent. *Kirb.* 215.

#### IV. WHAT THINGS MAY BE SUBMITTED.

All personal actions and things of an uncertain nature, as chattels personal, may be determined by arbitration. 1 Comy. Dig. ARBITRAMENT." (D. 3) *Kyd. Av.* 52.

So, a debt on a specialty or record, though certain, may be submitted amongst other things. 1 Lev. 292. 1 Bac. Abr. 203.

But freehold, or inheritance of lands, cannot be determined by arbitration. 1 Rol. 242. l. 10.

NOTE. On the point, how far a dispute concerning land could be referred to arbitration, and how far the parties were bound by the award, Mr. *Kyd* observes, there was anciently much doubt and uncertainty. After reviewing the several contradictory cases, his conclusion is, that where the parties might by their own act transfer real property, or exercise any act of ownership over it, they may refer any dispute concerning it to the decision of a third person, who may order the same acts to be done which the parties themselves might

do by their own agreement: therefore, that the expressions *that a freehold cannot be awarded, or a partition made by any award, &c.* must be understood to mean, that the land cannot be transferred, or a division made by the mere words of the award; but that it is necessary that the arbitrators should award such acts to be done, as would, if done by the voluntary agreement of the parties, amount to a proper transfer or partition at law.

Modern determinations in England have realized the rigor of the ancient rule. Thus, it has lately (in 1803) been held, "*that though an award cannot have the operation of conveying land,*" yet, when the lessor of the plaintiff and the defendant in ejectment had previously to the action referred their right to the land to an arbitrator, who had awarded in favour of the plaintiff, *the award concluded the defendant from disputing the lessor's title in an action of ejectment.* 3 East. 15.

The same principle had been settled in *Pennsylvania*, in the year 1792, where it was said that "*an award cannot give a right to land; but a report of referees will settle a dispute about land, either in an ejectment, or in an action of trespass.*" See 4 Dall. 122.

In *Virginia* (in 1794) the President of the Supreme Court of Appeals, speaking of an award concerning lands, says, that "*if any act be awarded to be done, for which a complete remedy cannot be had at law, such as to make a conveyance a bill in equity for a specific performance of the award is common or proper.*" 1 Wash. 295.

In *New Jersey* (in 1806) one of the judges, in delivering his opinion, recognizes the doctrine, that "*an award cannot operate as a conveyance of land.*" He further says, "*Arbitrators may award, if the submission authorizes it, that one party shall execute conveyances to the other. But this does not pass a title; and if the party refuses to convey, the remedy is on the bond. But in case the arbitrators should award the land, it would be an act exceeding their jurisdiction, and void of itself for that cause.*" 1 Pennington 48. ¶ But the decision of a majority of the court in this case, that the party who was awarded to do a certain act might make his election to abide by the determination of the arbitrators, or submit to the penalty of the bond, seems contrary to the modern determinations above mentioned. In all of which, it appears, that the court will give effect to the award.

And therefore there cannot be a partition by an award; for freehold does not pass without livery. 1 Rol. 242. l. 16.

So, it seems, the interest of an estate for years cannot be transferred by an award; for it is a chattel real. 1 Rol. 242. l. 20.

A thing certain cannot be submitted as a debt upon bond, *by itself.* 1 Lev. 292. Kyd. Aw. 51. Otherwise if the submission be by bond, for then the award would be a good bar. 1 Bac. Abr. 203.

Or, a debt upon record; as arrears of an account found before auditors. 1 Comy. Dig. 524.

But an award may be of the arrearages of a rent reserved upon a lease for years, (1 Rol. 242. l. 25.) if joined with things of an uncertain nature. 1 Bac. Abr. 202.



## AWARD.

o, if a man be bound to stand to an award, and the arbitrators make an award, *that land shall be conveyed*; if the party refuses the conveyance, he forfeits his obligation. 1 *Rol.* 244. l. 5.

o, if the condition of an obligation is, to stand to an award concerning lands; and the arbitrator awards the land to one, *and that the other shall release to him*: if he doth not release, the obligation is forfeited. 1 *Bac. Abr.* "ARBITRAMENT." (A.)

and although there be no bond, yet if the arbitrator do award that one shall infeoff the other; it seems that an action on the case may be maintained for not doing it. *Ibid.*

¶ If there be a clause in a will, directing that whatever controversies may arise on the construction of it shall be decided by particular arbitrators, the parties claiming under the will may notwithstanding have them decided at law, if they think proper. 10 *Mod. Kyd. Aw.* 21.

an award be, *that one shall pay so much in satisfaction of a specialty*; although the specialty is not thereby discharged, yet, if he commence action on the specialty afterwards, he forfeits his obligation. *Com. Dig.* "ARBITRAMENT." (D. 3) *Cro. Jac.* 447.

causes criminal are not arbitrable, because they ought to be punished for the common good. 1 *Bac. Abr.* 202. *Kyd. Aw.* 63. b. c. 5.

ut a personal assault, and the like, where it is made the subject of action, instead of an indictment, may be submitted. *Kyd. Aw.* 65,

causes matrimonial, or any thing concerning the contract or dissolution of marriages, cannot be submitted. 1 *Rol.* 252. pl. 10.

ut the damages a person sustained by a promise of marriage, or thing relating to a marriage portion, may be submitted. 1 *Bac.* 203.

## V. THE EXTENT OF THE SUBMISSION.

there be a submission of all actions and complaints; causes of action are submitted. 1 *Comy. Dig.* "ARBITRAMENT." (D. 4)

of actions personal, and suits and quarrels: actions real are submitted. *Ibid.*

there be a submission of all matters between them two; an action one of them and his wife against the other is not submitted. *Pol.* 246. l. 15.

of all demands; title to land is submitted. 1 *Ld. Raym.* 115. b. *Keil.* 99. b.

of all debts, sums of money and demands; specialties and judgments between them may be released. 2 *Saund.* 190.

of all differences or injuries; all demands may be released. 1 *Com.* 524. 3 *Bulstr.* 312.

ut by a submission of all actions, causes of action are not submitted. 1 *Rol.* 245. l. 20. *Kyd. Aw.* 141.

By a submission of *actions personal, suits and complaints*, actions real are not submitted; for *personal* applies to the whole. 1 *Rol.* 246.

By a submission by A and B, of the one part, and C of the other, of *all matters between them*, an action by A alone against C is submitted; for it shall be taken distributively. 1 *Rol.* 246.

By a submission of A, of *all matters*, a debt due from the wife of A, as executrix, is submitted. *Cro. Jac.* 447.

A submission of *divers other matters*, extends to real as well as personal concerns. 2 *Cainea*, 320.

If all matters in difference be submitted, it extends to a demand as executor. 2 *Str.* 1144.

If two partners refer all matters in difference between them, the arbitrators may dissolve the partnership. 1 *W. Bl. Ref.* 475.

☞ The extent of the submission may be various, according to the pleasure of the parties (*Kyd. Aw.* 26.) And it must be so understood as to give a reasonable construction to their meaning, and to make their intention prevail. See *Kyd. Aw.* 27, 28, 29. *Ibid.* 141 to 149.

A reference, by rule of court, "of all matters in dispute in the cause between the parties," confines the referees to the subject matter of that particular suit: but if it be, "of all matters in difference between the parties in the suit," the referees may take into consideration every matter of dispute between the parties. (*Kyd. Aw.* 149, 150. 2 *W. Bl. Ref.* 1118. 2 *Term. Ref.* 644-5.) And per Buller J. notwithstanding the above distinction is now well understood, yet it is too refined for the common understanding of mankind. He therefore suggests, that when a general reference is intended, it should be "of all matters in difference between the parties;" when a special reference, "of all matters in difference in the cause." 3 *Term. Ref.* 626.

## VI. THE SEVERAL KINDS OF SUBMISSION.

1. A submission to arbitrament may be by *parol* or words; and an *assumpsit* lies for non-performance (1 *Comy. Dig.* "ARBITRAMENT," D 1.) And (contrary to the former decisions) the very act of submission implies in itself a promise to perform. 3 *Bro. Ch. Ca.* 361. *Kyd. Aw.* 11.

2. So, a submission may be by indenture, with mutual covenants to stand to the award. 1 *Comy. Dig.* 520. 2 *Mod.* 73. *Willes* 248. 1 *Call.* 575.

3. But the most usual kind of submission is by mutual bonds; though it is not essential that they should be mutual. They may be given to a third person, or to the arbitrator himself; and even by persons other than the parties. See *Kyd. Aw.* 12.

Or, the submission may be by several obligations; as, where A gave a bond to B and C jointly, and they gave him separate bonds. *Cro. Car.* 433.

So, a bond made payable to two persons, one of whom is trustee for the other, and the arbitrators to be elected by the trustee only, is good. *Lutw.* 576.

So, if a submission be to four men by name, "so as the same award be delivered up in writing, by them, or any three of them," any three may make the award. (3 *Bulst.* 62.) In like manner, if the submission

be to four, so that an award be made by all, or three, or two, an award by two will be good. *Cro. Jac.* 278. See *Post. No.* 4.

4. A submission may also be by *rule of court*; and was either at common law, made in a cause depending in court (before the stat. 9 and 10 W. III. c. 15. See *Kyd. Aw.* 21. 1 *Wash.* 13. 2 *Burr.* 701. 1 *Dall.* 314) or may be, under the act of Assembly of Virginia, *before* the suit commenced. (1 *Rev. Code* 49.) "All merchants and traders, and others desiring to end any controversy, suit or quarrel, for which there is no other remedy but by personal action or suit in equity, may by arbitration agree, that their submission of the suit to the award or umpirage of any person or persons should be made a rule of any court of record which the parties shall choose, and may insert such their agreement in their submission, or the condition of the bond or promise, whereby they oblige themselves respectively to submit to the award or umpirage of any person or persons; which agreement being so made and inserted in their submission or promise, or condition of their respective bonds, shall, or may, upon producing an affidavit thereof, made by the witnesses thereunto, or any one of them, in the court, of which the same is agreed to be made a rule, and reading and filing the affidavit in court, be entered in the proceedings of such court, and a rule shall be made thereupon by the said court, that the parties shall submit to and finally be concluded by the arbitration or umpirage, which shall be made concerning them by the arbitrators or umpire, pursuant to such submission."

"And the award made in pursuance of such submission may be entered up as the judgment or decree of the court, and the same execution or process may issue thereupon, as on other judgments or decrees, and the court shall not invalidate such award, arbitrament, or umpirage, unless it be made appear to such court, that such award, arbitrament, or umpirage, was procured by corruption or other undue means; or, that there was evident partiality or misbehaviour in the arbitrators or umpires, or any of them. And any award, arbitrament, or umpirage, procured by corruption or other undue means, or where there shall have been such evident partiality or misbehaviour as aforesaid, shall be deemed and judged void and of none effect, and accordingly set aside by the court in which the submission shall be made, so as complaint of such corruption, or undue means, or evident partiality, or misbehaviour as aforesaid, be made before the end of the second court of quarter sessions, in the case of a county court, or at the end of the second term of any other court, next after such award, arbitrament, or umpirage, be made and returned to such court."

"Not to affect the power of courts of equity over awards, &c."

This act has been held not to extend to awards, in pursuance of an order of reference, made during the pendency of a suit; therefore the award need not lie two terms in court, before it be confirmed. 1 *Call.* 379. 2 *Call.* 433. 1 *Str.* 301. *S. P. on stat.* 8 and 9 W. III. 2 *Burr.* 701. 2 *Ves. jr.* 451.

If there be a reference, by rule of court, in a suit depending, to *four* arbitrators, or any *three*, and afterwards two others are added; if *two* of the first named, and *one* of the last, make an award, it is sufficient; and a majority of the whole is not required. 2 *Call.* 106.

And if the rule directs that the money awarded shall be paid to the sheriff, for the benefit of the plaintiff's creditors, the subsequent proceedings must be in that style also. *Ibid.*

If the plaintiff be bail for the defendant at the time of reference, in a suit then depending, it will be no objection to the award, that the arbitrators failed to award concerning that undertaking. *Ibid.*

5. Sometimes the submission is both by bond and rule of court, by adding the parties consent at the bottom of the condition; and then the party may proceed both by action and attachment. (1 *Salk.* 73.) And the court will not stay proceedings in the action, though the defendant be in custody on the attachment. (*Prec. Ch.* 223. 2 *Vern.* 444. *Kyd. Aw.* 315.) But if the defendant be taken in execution on the judgment, the attachment will be discharged. (*Kyd. Aw.* 315.) And the court will not grant an attachment after action brought, without some very particular reasons (*B. R. H.* 106); but in a late similar case it was absolutely refused, on the ground of the plaintiff's having made his election. 1 *Bos. & Pull.* 81.

If it be part of the condition of the bond, that no bill in equity shall be filed against the arbitrators, and a bill be nevertheless filed, the court, on motion, will order their names to be struck out. 2 *Atk.* 395.

Or, where there is no such restriction, if a bill be filed making the arbitrators parties, and calling on them to disclose the grounds on which they made their award, they may demur. If there be any palpable mistake, a bill may be filed against the party in whose favour the award is made. *Kyd. Aw.* 332. 1 *Wash.* 14.

The court will compel a witness to a submission to arbitration, to make affidavit of the execution, in order to make a rule of court. *Str.* 1. *Barnes* 58.

A submission may be made a rule of court, on motion of one party, and producing the bond executed by the other. *Barnes* 55.

It may be made a rule of court, though no part of the condition, only a memorandum signed before execution of the bond. *Barnes* 55.

And if the submission be by rule of court, the court will oblige performance, without making the award also a rule of court. 1 *Salk.* 71.

A consent in the submission bond, to make the award a rule of court, will not warrant the court's interposing; the submission must be made a rule of court. *Str.* 1178.

To bring a submission within the statute, it must be confirmed by rule of court prior to making the award. 3 *P. Wms.* 361.

If a bond says, and if he consent to have the submission a rule of court, it is sufficient. 1 *Sal.* 72.

In the construction of the stat. 9 and 10 W. III. c. 15, it has been held, that nothing was a ground for setting aside an award, but manifest corruption in the arbitrators. (1 *Str.* 301.) But if the award be defective, though the court will not set it aside, they will refuse any process to compel performance. (*Andr.* 297.) Yet it has been decided, that an award, upon a submission made a rule of court, pursuant to the above statute, may be avoided for other defects, as well as corruption in the arbitrators; as where the award is bad on the face of it. (7 *Term. Rep.* 73.) The objection on which last ground may be made at any time. (*Barnes* 56.) And in *Pennsylvania*, where their law requires

that the award be *approved by the court*, the judges confine themselves to two points; 1st, an evident mistake in matter of *fact*; 2dly, a manifest error in matter of *law*. 1 *Dall.* 315.

If a reference be agreed, a stay of proceedings shall be consequent. 1 *Mod.* 24.

And if there be an action upon a bond for non-performance, it will be a good breach, *that the defendant proceeded to execution*. 1 *Com. Dig.* 522.

So, if one serve a *subpoena* upon the other after submission by rule, it will be a breach. 1 *Salk.* 73.

But non-performance during contest is no contempt. 1 *Salk.* 73.

So, if any part of the award be impossible, for the non-performance of so much, no attachment goes. 1 *Salk.* 83.

## VII. WHEN A SUBMISSION MAY BE REVOKED.

In which way soever the submission is made, the same may nevertheless be revoked, though made irrevocable by the strongest words; for a man cannot, by his own act, make such authority or power not countermandable, which by the law, and its own nature, is countermandable. 8 *Co.* 82. *Kyd. Aw.* 29, 30. 7 *East.* 608.

But if the submission be by bond, if the party revokes, he forfeits his obligation, for that he hath broken the words of the condition, which are, that he shall stand to, and abide the award. 8 *Co.* 82. b.

And if the submission be made a rule of court, either at common law, or pursuant to the statute, if either of the parties revokes, the court will grant an attachment. *Kyd. Aw.* 33, 34.

But where parties by bond agreed to submit matters in difference between them to arbitration, and that the submission should be made a rule of court, it is competent to either party, even since the statute, to revoke by deed his submission; and notify the arbitrators thereof, before the authority be executed; and he cannot be attached for a contempt of court in not obeying the award, if made *after* such revocation and notice; though the submission be afterwards made a rule of court. But it seems that it would be a contempt to revoke the submission after it had been made a rule of court. 7 *East.* 608.

If the submission was by bond, the revocation must be in writing. (8 *Co.* 80. b.) And so of other deeds. *Kyd. Aw.* 30.

But if a submission be revoked, it is of no avail till notice of the revocation to the arbitrators. 8 *Co.* 82. a.

If the submission be by word, the party may revoke at pleasure, *and he forfeits nothing*; but he must likewise give notice of the revocation to the arbitrators, though it need not be in writing (8 *Co.* 83. a. *Kyd. Aw.* 30.) But see *Kyd.* 32, as to the forfeiture, *contra*.

If there be a submission by a *feme sole*, who marries before an award made, it will be a revocation, but no forfeiture. 1 *Comy. Dig.* 525. *Kyd. Aw.* 30.

So, if the woman and B submit on one part, and the woman marries, it will be a revocation as to B also. 1 *RoL.* 331. l. 45.

# VIII. OF THE AWARD; WHEN IT SHALL BE GOOD, AND WHEN NOT.

It may be necessary to premise, that, in the construction of awards, the courts both of England and of the United States have long since disregarded many of those nice distinctions to be met with in our old books. Awards are now *liberally* and *favourably* construed, so as to effectuate the *intention* of the arbitrators, appearing from the words of the whole. There are, however, two essentials in awards, that they be *certain* and *final*. See 1 *Burr.* 277. 2 *Wils.* 268. 2 *Call.* 584. 1 *H. & M.* 69. 1 *Dall.* 174. 1 *Caines* (N. Y.) *Term. Rep.* 315. 2 *Johns.* (N. Y.) *Rep.* 61, 62.

1. An award ought to be *pursuant to the submission*; and therefore if it be made of a thing merely out of the submission it is void. 1 *Rol.* 242. l. 35. *Kyd. Aw.* 140.

As, if it be awarded, that a stranger shall do such an act, it is void for so much; as, *that a stranger shall give a bond, &c.* 1 *Rol.* 243. l. 5. 247. l. 10. 10 *Co.* 131. b. *Kyd. Aw.* 156, 160.

So, in general, an award of a thing to be done to a stranger is void. (1 *Rol.* 243. l. 10. 10 *Co.* 131. b. *Kyd. Aw.* 156): but an award that money be paid to a stranger, where it is for the benefit of the party, is good; as if it be awarded that one of the parties shall pay so much to a creditor of the other party in discharge of a debt (*Kyd. Aw.* 158, 160); or where the stranger is a mere instrument (see *Post. No.* 7.) But if it be awarded that one of the parties shall *procure* a stranger to do an act, which he has no power to compel him to do, either by action at law, or bill in equity, it is void for so much; but if he have such power, it is good. *Kyd. Aw.* 188.

An award to *pay upon the land, or within the house of a stranger, is void*; for this obliges him to be a trespasser. 1 *Rol.* 247.

Otherwise, if it be *at the house*, for that does not make him a trespasser. 1 *Rol.* 247. 1 *Com. Dig.* 526.

2. An award of a thing which goes *beyond the time of the submission* is void; but an award of a general release of all demands till the time of the *award* is good; for no new controversy shall be intended to arise between the *submission* and *award*; and if it did, the award as to that only is void; for that was not within the submission, but is good for so much as goes to the time of the submission. And therefore it is a good performance to tender a release of all matters in controversy to the time of the submission. Also, if any new controversy has happened, which is not to be intended, he that pretends to excuse the non-performance ought, by his pleading, to set it forth. See *Salk.* 74. *Bunb.* 250.

The power of arbitrators, to award the costs of *suit*, has been long unquestionable (see *Kyd. Aw.* 134); but whether they may allow the costs of the *arbitration*, as happening after the submission, seems not to have been clearly settled. See 1 *Rol.* 254. l. 30. *Cro. Jac.* 578. 2 *Term. Rep.* 645. *Kyd. Aw.* (2nd edit.) 152. n. 8. *Ibid. Append.* p. 394.

3. An award of a thing *not submitted* is void; as, if the submission be of *all matters depending*, and the award be of *all matters generally*. 1 *Rol.* 243. l. 25.

If the submission be, of all matters except an obligation, and the award be of all demands. 1 *Rol.* 261. l. 2.

But if on a reference of all matters in difference between two partners, the award be that the partnership be dissolved; this is within the submission, and therefore good. 1 *Blacks. Rep.* 475.\*

So, if the reference be of all matters in difference, in this cause, and general releases be awarded, it is good as to matters referred, though void as to the residue. 2 *Blacks. Rep.* 1117. See *ante Div. V.*

A submission of *divers other matters*, is equivalent to a general submission of all controversies between the parties; and under it, general releases may be awarded. 2 *Caines* 320.

4. If the submission be, so that the award be made of the premises, the award shall be of all matters in controversy, of which they have knowledge; otherwise it will be void. (1 *Rol.* 256. l. 27. 8 *Co.* 98.) But neither the award nor umpirage need be stated to have been made of the premises; for it shall be so intended. See *Kyd. Aw.* 263-4. 2 *Johns.* 61.

The like law, if a submission be of all matters, so that the same award be made such a day, omitting, that it be made of the premises; for the words, the same award, &c. are tantamount. *Cro. Eliz.* 858. *Lutw.* 533.

If there be a submission to the award of *A and B*, so that, &c. and if they do not to an umpire, the clause so that extends to the umpirage. 1 *Lev.* 140.

If there be a submission of such and such things, specially named, so that, &c. an award not made of all is void; for they ought to take notice of them, being specially named in the submission, without other information. 1 *Rol.* 256. l. 35.

And, upon a reference of all actions, controversies, &c. and also two distinct matters of difference; if the arbitrators omit to decide one of such distinct matters, that vitiates the whole award; which cannot therefore be enforced by attachment. 7 *East.* 81.

If the submission be so that, &c. the award is sufficient, if it be of all matters notified to the arbitrators, though there be other matters not notified. *Cro. Jac.* 200.

If the parties submit all matters in difference, so that the award be made before such a day, and the arbitrators determine all matters, except one, concerning which they give liberty to one of the parties to prosecute further, the award is void for the whole. *Willes* 268.

An award made upon a reference of all matters in difference between the parties, does not preclude the plaintiff from suing upon a cause of action subsisting against the defendant at the time of the reference, upon proof that the subject matter of such action was not laid before the arbitrators, nor included in the matters referred. 4 *Term. Rep.* 146.

So, if it appear that the matter of the suit was never laid before the arbitrators. And, in both these cases, if the defendant plead the award

\* In *New-York*, it has been held, that a submission may be of matters concerning the realty. *Divers other matters*, in a submission, extend to real as well as personal concerns; and an award directing the exchange of lands is good. 2 *Caines* (N. Y.) *Term. Rep.* 320.

in bar of the action, the plaintiff may reply, stating the fact, that the matter of the suit was not included in the reference, or submitted to the arbitrators; and they are competent witnesses to prove it. *Ibid.* and *Kyd. Aw.* 138. 181.

5. If there be a submission of all controversies, *between A and B, of the one part, and C of the other, so that, &c.* an award of all between A and C, omitting B, is void. 1 *Rol.* 261. l. 15.

But if the submission be general, without a *so that, &c.* the award may be of part of the matters in difference. 1 *Rol.* 256. *Cro. Eliz.* 838. 8 *Co.* 98. a.

6. But if a thing awarded to be done be out of the submission, it is immaterial; if the matters for which the award is made are within it. 1 *Rol.* 245. l. 30. 1 *H. & M.* 67. S. P.

7. So, an award of a thing to be done to a stranger is good, where the stranger is only an instrument; as, *to pay money to a stranger, for the use or benefit of the parties.* 1 *Rol.* 247. 1 *Salk.* 74.

So, if a submission be by several, who are severally bound, an award that A and B pay, is good; for upon the whole of the case it appears, that B, though not named in the bond given by A, is not a stranger. *Cro. Car.* 433.

But an award does not bind a stranger to do any act, as a release, confirmation, &c. *Mo.* 3.

8. So, if an award exceeds, and goes to matters out of the submission, it is good for so much as is within the submission; as, if an award be, *that A and a stranger pay, &c.* it is good against A, and he is bound to pay, though it is void as to a stranger. 1 *Rol.* 244. l. 25. See *ante.* No. 6.

Or, *that A be bound with sureties, &c.* shall be good as to A. 2 *Lev.* 6. *Show.* 82. *Carth.* 159.

9. And there shall not be a strained construction, to make it to be out of the submission: and, therefore, if there be a submission of *all actions personal, so that, &c.* and the award be, *of and concerning the premises, that one shall pay so much at a future day, and then shall make a release of all actions personal;* the release shall be only of all actions till the submission. 1 *Rol.* 256.

So, an award of *general releases* extends only to matters at the time of the submission. 3 *Mod.* 264.

10. And if an award does not appear not to be pursuant to the submission, it shall not be intended: and therefore, if an award of the *premises* be of *all matters till the time of the award,* it is good; unless it be averred, that matters arose after the submission, and before the time of the award. 1 *Rol.* 244. See an excellent case, 2 *Caines* (N. Y.) *Rep.* 320.

So, a submission of *all matters, so that the award be made of the premises, &c.;* an award of the *premises,* of a single matter is good; for others shall not be intended unless they are shewn. 8 *Co.* 98. a. *Cro. Jac.* 285.

11. So, an award ought to be certain: and therefore, if the award be, *that one shall make an obligation for the enjoyment of lands,* without saying in what sum, it will be void for the uncertainty. 5 *Co.* 77. *Cro. Jac.* 344. *Mo.* 359.



But an award may be rendered certain by averment; as, if it be to pay a debt for which A was bound, without saying in what sum, it may be ascertained, by an averment, that he was bound only in such an obligation. 1 Rol. 263. l. 17.

So, an award to pay to the *executors* of J. G. deceased, is sufficiently certain, and it may be averred who they are by name. 4 Dall. 174.

So, an award to make a release, pay money, &c. without saying at what time, is good; for, if a request be necessary, it must be in convenient time after the request; if there needs no request, it must be done in convenient time. 1 Salk. 69.

An award without a date, to do a thing within seven days after the date, is good; for the date shall be computed from the delivery. 1 Salk. 76.

But an award, that the defendant should pay to the plaintiff such a sum of money, unless within 21 days (which in fact was after the time limited for making the award) the defendant shall exonerate himself by affidavit from certain payments and receipts, in which case he was to pay a certain less sum, is uncertain and inconclusive. 7 Term. Rep. 73.

An award, that one shall pay the costs of a suit, generally is good. (2 Vent. 243. Carth. 157. 2 Wils. 268. 1 Call. 575.) And the court may give costs, though the award does not mention them. 2 Call. 106.

12. An award ought to be possible and lawful. Kyd. Aw. 184, 185. ~ If an award be to do a thing which is not physically and morally in the power of the party to perform, it is void; as that he shall deliver up a deed which is in the custody of a person over whom he has no controul; that he shall procure a stranger to be bound with him, &c. or, that the defendant shall be bound with sureties, such as the plaintiff shall approve; for it may be impossible to force the approbation of the plaintiff. Kyd. Aw. 185, 186.

It was once held, that an award of damages for an injury, for which no damages are recoverable at law, is void, as for words, not actionable; but this has since been over-ruled. (see 2 Vent. 243. 3 Caines, 166.) But where the plaintiff's demand is founded on a contract against the positive provision of a statute, the court will not enforce an award. See 4 Dall. 298.

13. So, an award ought to be reasonable; and therefore, if the award be, that one shall release his land to the other in satisfaction of a trespass, it is void. 1 Rol. 249. See 1 Com. Dig. 547.

14. So, an award ought to be mutual; and therefore if it be of one part only, and nothing of the other, it shall be void. 1 Rol. 253.

But an award, ordering payment of a sum of money, carries in itself a mutuality, as it must be held in satisfaction of the matter submitted. See Livingston J. 3 (N. Y.) Term. Rep. 255. See also, 1 (N. Y.) Term. Rep. 313, &c.

15. An award ought to be final; and therefore an award to stand to the arbitrament of such an one is void. 1 Comy. Dig. "ARBITRAMENT," (E 15)

Arbitrators have no power to delegate their trust and authority to others; nor to erect a new and arbitrary tribunal, to determine future controversies. 4 Dall. 74, 75. B. R. H. 172, 181. Abbott v. Long. S. P.

An award to pay so much, or if it be proved by such a day, &c. that then there shall be a further award, is void. 1 *Roll.* 251. l. 3.

Or, to pay so much, and if there be proof within a month of more due, to pay that also. 1 *Roll.* 251. l. 30.

Or, to make submission to B, in such manner and place as B shall say; for B will determine for himself. 1 *Salk.* 71.

Or, that one shall give a bond to the other for such a sum, with such securities as he shall approve, and that they shall make mutual releases; for, if he will not approve of the securities, nothing is done. 3 *Moot.* 272.

But an award, to give a bond for payment, is good. 1 *Roll.* 249.

Or, to give such a bond as his counsel shall advise. 1 *Roll.* 250. l. 20.

So, an award that one party shall pay the other a specific sum of money is sufficient and final, without a release. 2 *Johns.* (N. Y.) *Rep.* 57.

An award, that all suits shall cease, is good (1 *Salk.* 74.) Or, that a bill in equity be dismissed (*Ibid.* 75.) Or, to enter a retraxit. *Kyd.* *Aw.* 211.

It has been said that an award, that each shall be non-suited, or discontinue his action against the other, is not good; for they may sue *de novo* (1 *Comy. Dig.* "ARBITRAMENT," [L 15.] 2 *Sira.* 1024.) As to the award of a *non-suit*, Mr. *Kyd* observes, that it has been held not to be final, from the time of the year-books to the present day (*Kyd.* *Aw.* 210); but with respect to the *discontinuance*, he holds a different opinion (*Ibid.*) It was, however, settled in the state of New-York, in 1803, that an award, "that the said suit shall be no further prosecuted," is sufficiently certain and final (see 1 *Caines* 304.) And in a very late case in England, decided in 1808, it was held that an award, that certain "actions be discontinued, and each party pay his own costs," is final and good. And the cases relied upon from *Comyns's Digest* and *Strange*, above cited, were over-ruled.

If the award be of a thing to be done at a future day, it is final, if it must then be absolutely done; as if it be to pay money at three several days to come. *Palm.* 110. *Kyd.* *Aw.* 215.

So, to give a note or a bond, for the payment of money at a future day. 2 *Sira.* 1082.

But if it depend on a condition whether it must be executed or not, then it is not final; as if it be, that money shall be refunded, if it appear afterwards that the party was not entitled to retain it. *Palm.* 110.

But if the award directs, that should any mere clerical mistakes, in the calculations, be discovered, the defendant shall refund; this does not open the merits of the dispute, but the award is final. 2 *Johns.* 57.

Where the first part of an award is final, and a *proviso* is afterwards added, giving a power to either party to render it void, by an act to be done within a time limited, after that appointed for the performance of that which makes it final, the *proviso* is repugnant to the former, and will be rejected. *Fifth.* 15, 16. See 1 *H. & M.* 67.

But where the *proviso* is not merely repugnant to the other part of the award, but so connected with it, that, on the construction of the whole, the award is not final, there the whole award is void. *Kyd.* *Aw.* 217.

16. An award must be entire; but it may be conditional; in the alternative; or with a penalty. See *Kyd. Aw.* 203. 1 *Comy. Dig.* 535.

17. So, an award ought to give a benefit or satisfaction for the thing submitted. And therefore if an award orders nothing to be paid or done, it shall be void. 1 *Rol.* 251. 1 *Comy. Dig.* 536.

As, if an award be that one shall go to Rome; for this is no advantage to the other. 1 *Rol.* 252.

But an award, that all differences do cease, is good; for this is a mutual advantage. *Mod. Cas.* 34, 35.

Mutual releases are advantageous, and therefore an award of them is good; and the condition of a bond to stand to an award will be broken, by not giving them, though there be no other means of compelling performance, than by an action on the bond. *Kyd. Aw.* 192.

18. If an award be void for all that is to be done on one part, it is void for the whole. 1 *Rol.* 258.

When a report of referees awards money to be paid on one side, and certain other things to be done on the other, if the court cannot enforce both, they will certainly enforce neither. 1 *Dall.* 364. *Kyd. Aw.* 247, 249.

But though the court may not be able to do this by execution, yet, if they can do it by attachment, the remedies are mutual, though not by the same kind of process. *Ibid.*

19. But an award may be void for part, and good for the residue. 2 *Wils.* 268, 293. *Willes* 62, 66. *Kyd. Aw.* 243.

And therefore, if an award be of matters out of the submission, it is void only for those. *Kyd. Aw.* 245. 1 *H. & M.* 67.

So, an award unreasonable, or impossible in part, shall be good for the residue. 1 *Rol.* 259. *Kyd. Aw.* 254.

Yet if, by the nullity of the award in any part, the one shall not have all the advantage intended him as a recompence for that which he does to the other, it shall be void for the whole, though it would be mutual, notwithstanding the null part were rejected. 2 *Saund.* 293. b. *Wms. note.*

As, an award that A pay ten pounds, and B, his wife and son, convey land to him, is void for the whole; for, though by the conveyance of B the award would be mutual, yet he has not all the benefit intended for him, for perhaps the estate was in his wife and son. 1 *Rol.* 259.

20. A *parol* award shall be void, which awards money to be paid by one, and a release by the other; for there is no remedy for the release, where the award was by *parol*. 1 *Sid.* 160, for a *parol* award gives no remedy for a collateral thing. 1 *Lev.* 113.

But an award by *parol* may be good, where the submission does not expressly require it to be in writing. *Kyd. Aw.* 116, 260, 261.

Though not the express words, but the effect and substance of them, only are mentioned. *Carth.* 157.

Though the submission says, so that it be made and ready to be delivered, &c. for when it is made, it is ready to be delivered. 1 *Sal.* 75.

### Construction of awards.

It is now determined, that in the construction of awards, greater latitude, and less strictness, should be observed than heretofore; as.

in the following case, which was an award made by a cobbler, on a submission of all disputes. "Whereas there has been a suit at law between the parties, that has run to a great expence on both sides; and it being left to me to make an end of it: I determine that they shall each of them pay their own charges at law; and that the defendant pay the plaintiff five shillings, for his making the first breach in the law." And the award was held to be sufficiently certain and final. 1 Burr. 274. *Hawkins v. Coleclough*. See ante. No. VIII. and *Kyd, Avo. 228*, et seq.

### IX. OF THE UMPIRE.

If there be a submission to arbitrament, it may be, that if the arbitrators do not agree, the parties shall stand to the umpirage of such an one. 1 Comy. Dig. "ARBITRAMENT," (E 20.)

Or, if they do not agree for all the matters, they shall stand to an umpirage for the residue. 1 Rol. 262, l. 50.

And the words shall be construed liberally; and therefore, a submission to the award of A and B and D, being an umpire, is tantamount, as that D shall be an umpire. 1 Rol. 262, l. 5.

And if the umpire elected refuse, they may choose another. 3 Lev. 263. 2 Vent. 114, 115. *Cont.* per Holt. unless the election of him who refuses be conditional, if he does accept it. 1 Salk. 70. But see a different opinion to that of Holt, 3 Lev. 236. 2 Vent. 113, and 1 Salk. 70, *Evans's* note.

If the submission be, so that there be an award before the first of M. and if they do not agree to stand to an umpire; they may elect after the first of M. (2 Mod. 169.) provided it be within the time allowed the umpire. See 1 Salk. 70, *Evans's* note.

But now it is decided that arbitrators, having power to elect an umpire, may elect one before they enter into an examination of the matters referred to them at all. 2 Term. Rep. 644. 2 Johns. 57.

### X. WHAT SHALL BE A BREACH OF THE AWARD.

If a man does not do all that the award requires of him, it will be a breach: as, if an award be, that A enjoy an house, paying rent to B, if he does not pay the rent, it will be a breach. Cro. Eliz. 211.

But failure in a matter collateral to the award is not a breach: as, if an award be, that A make a lease to B, rendering rent; if B do not pay the rent, it is no breach, for A has a remedy for it by distress. Mo. 3. See 1 Comy. Dig. 338-9.

### XI. OF THE REMEDY FOR NON-PERFORMANCE.

1. If the submission be by bond, and the award be not performed, an action of debt on the penalty lies. 1 Comy. Dig. 339.

2. If by articles of agreement, indenture, &c. under hand and seal, an action of covenant may be brought. 2 Mod. 73.

If one of two executors refer, by deed, a matter in his own right, and one in right of his testator, and the referees thereon award a sum of money to himself, and another to him and his co-executor, the award is good. 1 Call. 375.



In such case he may sue on the covenant of submission in his own name, and it will not be a variance. *Ibid.*

3. Or, debt lies for a sum awarded. *Cro. Jac.* 354. 1 *Leo.* 72.

4. If the submission be by *parol*, *assumpsit* lies for non-performance. (1 *Rol.* 7. l. 15.); or an attachment. *Barnes* 54.

5. If the submission be by *rule of court*, an attachment lies for non-performance. (1 *Comy. Dig.* 521.) And this was the practice at common law, before the statute of 9 and 10 W. III. (See *Kyd. Aw.* 313. 1 *Dall.* 365.) But, in Virginia, the usual process is an execution, as authorised by the act.

Though the doctrine is laid down in *general terms* above, "that on a submission by rule of court an attachment will lie for non-performance," and is, perhaps, warranted by practice; yet in the case of *Lucas v. Wilson*. (2 *Burr.* 701.) the court refused an attachment, where the reference was made while the cause was depending, saying, that such references were not within the act, which only applied to submissions where no cause was depending.

*With respect to the pleadings in awards the following rules are essentially necessary to be known.*

(1) If an action be upon an obligation, &c. for performance of an award; the defendant cannot plead performance generally; but must first take *Oyer* of the obligation and condition, and then show the award, and how he has performed it. *Mo.* 3.

And must shew performance of the whole award on his part. (3 *Lev.* 24.) Or, a tender and refusal, which is tantamount. *Ibid.*

And it is sufficient, that the defendant alledges, that he performed as much as the words of the award require him to perform: as, if an award be, *that a suit do cease, and the plaintiff stand acquitted of it*, it is sufficient to say, *that he did not prosecute the suit, but the plaintiff was thence discharged of it*, without shewing a discharge in fact. *Cro. Jac.* 340. 1 *Rol.* 7. 2 *Bulst.* 93.

(2) So, to debt on an obligation for performance of an award, the defendant, after *oyer* of the condition, may plead, *that the arbitrators made no award*. 2 *Saund.* 184. *Lev. Ent.* 40.

If he pleads *no award*, he can say nothing by rejoinder, but what shews the award void. (1 *Lev.* 245.) He cannot confess, and avoid. 2 *Caines* 320.

If an award be void, it is safest to plead *no such award*; for if he sets out the award, and pleads performance, the plaintiff by his replication may say, that the award was also in such a manner (which will make it good) and join issue upon the performance, and the defendant cannot afterwards deny or traverse the award. 1 *Rol.* 6. 1 *Comy. Dig.* 541.

And if the defendant plead a bad plea, the plaintiff may demur, and shall have judgment, without shewing the award in his replication, or assigning any breach. 3 *Lev.* 17.

Yet if he plead *no award*, and the plaintiff shews an award upon a submission so that, &c. (which would be a conditional submission) he cannot say that there were other contests of which there was no award; for that will be a departure. 1 *Lev.* 127. 1 *Wils.* 122.

(3) If the defendant pleads, *that the arbitrators made no award*, the plaintiff by his replication must shew the award, and assign a breach of it. *Lev. Ent.* 40. *1 Comy. Dig.* 541.

And the plaintiff in debt upon the obligation must shew the whole arbitrament; and therefore, to say, *amongst other things it was awarded*, is not good. *Lit.* 313. *Kyd. Aw.* 289.

But in debt upon the award, the plaintiff may declare, that *among other things it was awarded*. See *post* (5).

In an action on the bond, the plaintiff need not aver a mutual submission, but it is otherwise in debt on the award. *2 Stra.* 923.

If the plaintiff, in debt on the bond, sets forth an award in his replication, and there are material omissions, he cannot recover; otherwise, if the omissions be in a void part of the award. *1 Salk.* 72. See *Kyd. Aw.* 280.

If the arbitrament shewn be void, or not well pleaded, the defendant may demur, and have judgment for him. *1 Comy. Dig.* 542.

But if the award shewn be good as to part, and void as to part, though he must set out the whole award, yet he may assign as a breach only non-performance of that which is good, and on demurrer, which confesses the breach assigned, judgment shall be given for the penalty of the bond, which will be a bar to any other action on the same bond. *2 Wils.* 268.

If the defendant shew an award imperfectly in his bar, the plaintiff in his replication must shew the whole award, otherwise he might be tricked. *1 Saund.* 326.

(4) So, the plaintiff by his replication must shew that the award was made in all points pursuant to the authority of the arbitrators. *1 Comy. Dig.* 542.

And therefore, if an award ought to be made before such a day, the plaintiff shall shew it was made accordingly. *Ibid.*

If it ought to be ready to be delivered to the parties before such a day, he must shew that it was ready to be delivered accordingly. *1 Rol.* 416. l. 5.

If the award was to be made *in writing, under hand and seal*, and the plaintiff replies that it was made *in writing*, it is not well. *Sir.* 116.

If it was to be under *hand and seal*, if he does not alledge, that it was sealed, it is bad. *Cro. Jac.* 278.

Or, if he does not say *under his hand*, though he produces the award sealed. *2 Mod.* 77. *Pal.* 109, 112, 121. *2 Rol.* 243. *1 Buist.* 110.

If it ought to be delivered to *either of the parties*, he ought to alledge a delivery to both. *2 Rol.* 250. *Cro. Eliz.* 797.

So, a *parol* award, if it be pleaded that it was ready to be delivered, is good; for when it is pronounced, it is a delivery. *1 Salk.* 75. *Mod. Ca.* 160, 176.

If there be a submission, to be delivered such a day and place; if he alleges a delivery to the parties the day before, it is sufficient. *2 Lev.* 68.

If it be, to be delivered to the party who desires it; it is not necessary to alledge that it was delivered; for it shall come from the other side, that it was desired. *3 Mod.* 330. *Sho.* 243.

If an award was by *parol*, it is sufficient to show the substance or effect of it; for the words are not necessary. 2 *Vent.* 242.

If there was an award to do two things, and as to one, it was not within the submission; it is sufficient to say that he performed the other. 1 *Comy. Dig.* 543.

So, if an award be to *pay so much, or to give surety to pay so much*; it is sufficient to say, *that he did not pay*, for the other part of the disjunctive was void. *Sav.* 120.

If the defendant pleads *no such award*, it is not sufficient, that the plaintiff shews the award, he must also assign a breach. *Yelv.* 78.

But if the defendant plead a collateral matter, &c. and the plaintiff join issue upon it, he need not assign a breach. *Yelv.* 79. *Lut.* 528. 3 *Lev.* 24.

If the plaintiff shews an award, and assigns a breach, the defendant cannot afterwards alledge payment, or performance of the thing in which the breach was assigned, for that will be a departure. 1 *Comy. Dig.* 544.

(5) In debt on the award, the plaintiff need not set forth the whole award, only what is necessary to support his claim, and the defendant may impeach the award, if he can. 1 *Burr.* 278. 2 *Johns.* 57.

And the declaration must aver a mutual submission, though it is not necessary in an action on the bond. 2 *Stra.* 923.

If the declaration be, *that so much was awarded to the plaintiff*, without shewing the award of the other part, it is good; for the defendant shall not plead *no such arbitrament*, but *nil debet*; and if no award, or a void award, be given in evidence, the issue shall be for the defendant. 1 *Comy. Dig.* 540.

On *nil debet* pleaded, to an action of debt upon an award, the defendant cannot give in evidence partiality in the arbitrators. 2 *Wils.* 148.

If in debt for a sum awarded, the plaintiff shews a defective award, though more than he need to do, the declaration is bad. 1 *Comy. Dig.* 540.

(6) If *assumpsit* be brought for not performing an award, the declaration must shew an award good in all respects. 1 *Comy. Dig.* 540.

And it is said that a *parol* award is not good for a collateral thing; but only for the payment of money. *Ibid.*

## XII. HOW AN AWARD MAY BE RELIEVED AGAINST.

An award may, in some cases, be relieved against, in a court of common law; but "the court will not enter at all into the merits of the matter referred to arbitration; but only take into consideration such legal objections as appear upon the face of the award, and such objections as go to the misbehaviour of the arbitrators." 2 *Burr.* 701. See *ante. Div. VI. No. 5.*

If the award be made under a reference by rule of court, according to the statute, a motion to set it aside for *extrinsic matter* must be made within the time limited by the act; but objections for illegality, *appearing on the face of the award* itself, may be made at any time. (7 *Term. Rep.* 73.) But where the submission is by reference *ad nisi prius*, there is no time limited for objecting to an award for any cause; whether for

corruption, or for objections appearing on the face of the award. *Kyd. Av.* 541.

But where the cause was depending when the rule of reference was made, an attachment for non-performance has been refused; the court holding that such references were not within the statute, but stood upon the common law, independent of the statute; which was made to put submissions to arbitration, in cases where no cause was depending, upon the same footing as those where there was a cause depending. (2 Burr. 701.) But, see *Kyd on Awards*, 313, 340, where it is said, the court in ALL CASES would grant an attachment.

A court of chancery may correct a palpable mistake, or miscalculation, made by arbitrators; or relieve against their partiality or corruption. (5 Atk. 609. [644.] 2 Ves. jr. 15. 2 Johns. 63. S. P.) Or, for exceeding their power; and an award contrary to law is of that description. 2 Ves. jr. 15.

And the party injured may bring a bill against the other party, but not against the arbitrators. 3 Atk. 609-10. [644.]

But there is no remedy in the above cases, at law, where the award is made under a submission not within the statute. 3 Wils. 148. 2 Ves. 315. 2 Johns. 63.

An action at law will not lie to recover a sum of money, being the amount of a mistake made by arbitrators, in their calculation. (2 Johns. 63.) Objections to an award being such as might equally have been the subject of jurisdiction in a court of law, where the reference was made a rule of court, chancery will not interpose. 9 Ves. jr. 67.

A bill lies to set aside, for fraud, an award made a rule of a court of law, under the statute. 2 Ves. jr. 451.

If an arbitrator be charged with combination, he may be made a defendant; and on proof of the fact, he shall pay costs. 2 Ves. jr. 453.

If a bill be brought to set aside the award, and the defendant pleads the award, but by his answer submits to amend errors, the court will order the plea to stand for an answer, though the proper proceeding should have been in the court of law, by shewing cause against the attachment. 2 Atk. 155.

A court of equity will take cognizance of an award after the time elapsed, by the statute. *Burb.* 265.

So, chancery will enforce an award, made on submission of the parties, without an order of the court. 1 Ch. R. 85, 142. 2 Comy. Dig. 573. 2 P. Wms. 430.

So, a court of chancery will decree the specific performance of an award to convey an estate, where the party submitting has received the money, the consideration for doing it. 3 P. Wms. 187.

So, if an award made by the order court be unreasonable, chancery will avoid it; as, if it be awarded that a guardian shall give bond that the infant at full age shall convey. *Ca. Ch.* 280.

Or, if the award in any case bind an infant. *Ibid.*

So, if it appear that the arbitrators mistook the fact or the law. (2 Fern. 705.) So also will a court of law correct an error in law. See 1 Bl. Rep. 364.

But an award cannot be impeached for an erroneous judgment, in regard to facts; it may allow compound interest due by contract,



either express or implied, from the nature of the transaction; and, whether it be due or not, is a conclusion of fact, on which the judgment of the arbitrators is final. 2 *Ves. jr.* 24.

An award ought not to be set aside, either in a court of law or equity, on the ground of a mistake in the judgment of the arbitrators, unless that mistake be *very palpable*; a mere difference of opinion between the court and arbitrators, in a *doubtful case*, not being sufficient to authorise such interference. 2 *H. & M.* 408.

Reasons for setting aside awards are, either for some illegality, or injustice apparent on the face of them, or for misbehaviour in the arbitrators. 1 *Wash.* 14.

To set aside an award for *mistake* in the arbitrators, either as to law or fact, the mistake must appear upon the face of it. Or, if the arbitrators will certify the principles upon which they proceeded, the court will set aside the award, if improperly made. Affidavits may be introduced, but they must go to prove *misbehaviour*, but not *mistakes* in law or fact. 1 *Wash.* 158.

But no calculations, or grounds for an award, which are not incorporated in it, or annexed to it at the time of delivery, are to be regarded, or received as reasons or grounds to avoid it. 1 *H. & M.* 67.

In *Pennsylvania*, where there is no court of equity, and the law of that state, in relation to references, makes it necessary that the report of the referees should be *approved by the court*, it has been considered the duty of the court to enquire into the allegations which have been made against such reports; in doing which, they have always confined themselves to two points: 1st, Whether there is an evident mistake in matter of *fact*; or 2dly, whether the referees have clearly erred in matter of law. 1 *Dall.* 315.

Money voluntarily paid in compliance with an award cannot be recovered back, in an action of *indebitatus assumpsit*. 1 *Day's Ca. Err.* 130.

An award performed will be a sufficient bar to an action, for the matters submitted, and awarded upon, until regularly set aside; nor can the plaintiff in such an action attack its validity, by alledging fraud in the party, in obtaining it. *Ibid.*

Where an award on the face of it is final, nothing  *dehors*  the award can be pleaded, or given in evidence against it. 3 *Johns.* 367.

But it is improper to come into a court of chancery to set aside an award, merely for an objection in point of form. 2 *Atk.* 501.

If part of the evidence is not shewn to one of the arbitrators, and he swears if he had seen it, that he would not have made the award, it shall be set aside. 1 *Atk.* 63.

So, chancery will admit exceptions, though the reference is by order of court, with a clause that the award shall be confirmed by the court, without exception or appeal. 2 *Vern.* 109.

If one of the parties, hearing that the arbitrator intends to make his award, desires him to defer it till he can talk with him to support stated accounts, notwithstanding which he makes his award, the time expiring in two or three days, the court will set aside the award. 3 *P. Wms.* 261.

A court of chancery will set aside an award, if it be made only for part of the matters referred. 1 *Ca. Ch.* 87, 186.

Or, if an award is repugnant, or impossible. 1 *Ca. Ch.* 87.

And therefore the court may examine the reasons and grounds of the proceedings of the arbitrators, and what matters they considered. 1 *Ca. Ch.* 186.

A submission to reference, by order of the court of chancery, is revocable; but if the revocation be without cause, it will be a contempt to the court. *Ca. Ch.* 185.

If an award is made upon private submission without an order of court, *chancery* may avoid it, if it be made by corruption, or if it exceeds the authority of the arbitrators. 1 *Ca. Ch.* 377.

So, if an umpire, before the time of the referees is elapsed, declares that he will give so much, and afterwards does give so much, which was more than was demanded by either referee, the award shall be avoided; for it induces a presumption of corruption. 2 *Vern.* 100.

If an arbitrator makes an improper declaration, as that he will make A pay costs, or that A having misused B, he will now mulct him in his representatives, the arbitrator shall pay costs. 2 *Ves.* 315.

If an arbitrator promises to hear witnesses, and afterwards refuses, or omits to do it, the award shall be set aside. 2 *Vern.* 251.

If a reference is to three, or any two of them, and two, without consulting the third (after finding that his opinion differed from theirs) make up an award, it shall be set aside. 2 *Vern.* 514.

So, if the arbitrators admit and hear one party, and conceal their meetings from the other. 2 *Vern.* 515.

So, if an arbitrator is a party who has an interest in the matter in question; or is a near relation to one of the parties. 2 *Vern.* 251.

Or, if they choose an umpire by lot. 2 *Vern.* 485.

But the court of chancery will not avoid an award on account of excessive damages, if no fraud or partiality appears. 2 *Ca. Ch.* 140. 1 *Vern.* 157.

Nor, for the non-attendance of one party, if he had an opportunity and would not attend to be heard. *Eq. Ca.* 65.

On a bill to set aside an award, the plaintiff will not be suffered to go into legal objections, except for partiality and corruption; but if the bill is for an account, and prays to set aside an award, in order to let in such account, there the plaintiff may make legal objections. *Amb.* 245.

An award cannot be set aside upon the simple ground of *erroneous judgment* in the arbitrator, for to *his judgment* they refer their dispute, and that would be a ground for setting aside every award. In order to induce the court to interfere, there must be something more, as *corruption in the arbitrator*, or *gross mistake*, either apparent upon the face of the award, or to be made out by evidence; but in case of *mistake*, it must be made out to the satisfaction of the arbitrator, and the party must convince *him*, that his mind was influenced by that *mistake*; and that if it had not happened, he should have made a different award. Upon a general reference to arbitration, the arbitrator has a greater latitude than the court. *Per Ld. Chan. Thurlow*, 1 *Ves. jr.* 369. Cited 1 *Vin. Supp.* 306.

*(A) Form of submission by rule of court.*

[NOTE.—If the suit is instituted and depending between the parties there is no necessity for this form, but the order is entered on the minutes of the court, on motion of the parties, in their proper persons, or by counsel. The following form is only necessary where no action is actually depending.]

Whereas divers disputes and controversies have arisen and are now depending between A B, of                      of the one part, and C D, of                      of the other part: Now for the ending and deciding thereof, it is hereby mutually agreed by and between the said parties, that all matters in difference between them shall be referred and submitted to the arbitrament, final end and determination of A A, of                      B A, of                      and C A, of                      or any two of them, arbitrators indifferently elected by the said parties, so as the said arbitrators, or any two of them, do make and publish their award in writing, ready to be delivered to the said parties, or such of them as shall desire the same, on or before the                      day of                      next ensuing the date hereof: And it is hereby mutually agreed by and between the said parties, that this submission shall be made a rule of court. In witness whereof the parties to these presents have hereunto set their hands this                      day of                      in the year &c.

*(B) Arbitration bond.*

Know all men by these presents, that I, A B, of                      am held and firmly bound unto C D, of                      in the sum of                      of lawful money of                      , to be paid to the said C D, or to his certain attorney, his executors, administrators or assigns: To which payment well and truly to be made, I bind myself, my heirs, executors and administrators, firmly by these presents, sealed with my seal, and dated this                      day of                      in the year of our lord

*(C) Condition to stand to the award of two arbitrators in the common form.*

The condition of the above obligation is such, that if the above-bound A B, his heirs, executors and administrators, on his or their parts and behalfs, do and shall well and truly stand to, obey, abide by, perform, observe, fulfil, and keep\* the award, order, arbitrament, and final determination of A A, of                      and B A, of                      arbitrators indifferently named, elected, and chosen, as well for and on the part and behalf of the above bound A B, as the above named C D, to arbitrate,

\* In all the settled forms of submission, whether by bond or indenture, there appears to be much tautology; but it is generally the safest course to follow precedents long known and established. Lord Coke, in reference to this very subject, finds an use for almost every word. "This form," says he, "was invented by prudent antiquity: and it is good to follow, in such cases, the ancient forms and precedents, which are full of knowledge and wisdom." 8 Co. 82, b. Vyner's case.

award, order, adjudge and determine, of and concerning all and all manner of action and actions, cause and causes of action, suits, bills, bonds, specialties, judgments, executions, extents, accounts, debts, quarrels, controversies, trespasses, damages and demands whatsoever, both in law and equity, or otherwise howsoever, which at any time or times heretofore have been had, made, moved, brought, commenced, sued, prosecuted, committed, done, suffered, or depending by or between the said parties, so that the said award be made in writing, under the hands of the said A A and B A, and ready to be delivered to the said parties, on or before the day of next ensuing; [and if the said A B, his heirs, executors, or administrators, or any of them, shall not prefer, or cause to be preferred, any bill in equity against the said A A, and B A, or either of them, for or concerning their award in the premises;] then this obligation to be void, otherwise to remain in full force.

☞ If the parties wish to make their submission a rule of court, then this may be added:

And the above named A B doth agree and desire, that this his submission may be made a rule of the court of

☞ Two sets of bonds are necessary, which are to be given by each party to the other, only changing the names of the parties.

*(D) Condition to stand to the award of three arbitrators, or any two of them, and an umpire appointed.*

The condition of this obligation is such, that if the above bound A B, his heirs, executors, and administrators, on his or their parts and behalfs, shall and do well and truly stand to, obey, abide by, observe, perform, fulfil, and keep the award, order, arbitrament, and final determination of or any two of them, arbitrators indifferently elected and named, as well by and on the part and behalf of the said A B, as by and on the part and behalf of the said C D, to arbitrate, award, order, judge and determine, of and concerning all and all manner of action and actions, cause and causes of action, suits, bills, bonds, specialties, covenants, contracts, promises, accounts, reckonings, sums of money, judgments, executions, extents, quarrels, controversies, trespasses, damages, and demands whatsoever, at any time heretofore had, made, moved, brought, commenced, sued, prosecuted, done, suffered, committed, or depending, by or between the said parties, so that the award of the said arbitrators, or any two of them, be made and set down in writing, under their or any two of their hands, ready to be delivered to the said parties in difference, on or before the day of next ensuing, then this obligation to be void, else to be and remain in full force.

And if the said arbitrators shall not make such their award of and concerning the premises, within the time limited as aforesaid, then if the said A B, his heirs, executors, and administrators, on his or their part and behalf, do and shall well and truly stand to, observe, perform, fulfil, and keep the award, determination, and umpirage [if the umpire be agreed on between the parties, and named] of

ing a person indifferently named and chosen between the said parties for umpire; [*but if not named*] of such person as the said arbitrators shall indifferently choose for umpire, in and concerning the premises; so as the said umpire do make and set down his award and umpirage in writing, under his hand, ready to be delivered to the said parties in difference, on or before the day of next ensuing; then, &c.

☞ To this the parties may add clauses as in form (C) if they think it necessary to restrain any suit being brought in equity: also to make the submission a rule of court.

### (E) *Form of an award.*

To all to whom these presents shall come, we A B, of and  
C D, of do send greeting.

Whereas there are several accounts depending, and divers controversies have arisen between of of the one part, and of of the other part: And whereas for the putting an end to the said differences, they the said and by their several bonds, or obligations, bearing date last past, are reciprocally become bound each to the other in the penal sum of to stand to, abide, perform, and keep the award, order and final determination of us the said so as the said award be made in writing and ready to be delivered to the parties in difference, on or before next ensuing, as by the said obligations and conditions thereof may appear: Now know ye, that we the said arbitrators, whose names are hereunto subscribed, taking upon us the burden of the said award, and having fully examined and duly considered the proofs and allegations of both the said parties, do make and publish this our award between the said parties in manner following; that is to say; first we do award and order, that all actions, suits, quarrels, and controversies whatsoever, had, moved, arisen and depending between the said parties in law or equity, for any manner of cause whatsoever touching the said premises, to the day of the date hereof, shall cease and be no further prosecuted; and that each of the said parties shall pay and bear his own costs and charges in any wise relating to or concerning the premises. And we do also award and order, that the said shall deliver or cause to be delivered to the said at within the space of &c. And further, we do hereby award and order, that the said shall on or before pay or cause to be paid unto the said the sum of We do also award and order, &c. And lastly, we do award and order that the said and on payment of the said sum of shall in due form of law execute each to the other of them, or to the other's use, general releases, sufficient in the law for the releasing by each to the other of them, his heirs, executors, and administrators, of all actions, suits, arrests, quarrels, controversies and demands, whatsoever, touching or concerning the premises aforesaid, or any matter or thing thereunto relating, from the beginning of the world, until the day of last past (*viz. the day of the date of the arbitration bonds.*) In witness whereof we have hereunto set our hands the day of &c.

*(F) Form of an umpirage.**(Recite the arbitration bonds as in the award.)*

Now know ye, that I, \_\_\_\_\_ umpire indifferently chosen by  
 having deliberately heard and understood the griefs, allegations and  
 proofs of both the said parties, and willing (as much as in me lieth)  
 to set the said parties at unity and good accord, do by these presents  
 arbitrate, award, order, decree and judge as followeth; that is to say,  
 &c.

*(G) A general release, in obedience to an award.*

Know all men by these presents, that I, A B, of, &c. have remised,  
 released, and forever quit claimed, and by these presents do remise,  
 release, and forever quit claim, unto C D, of, &c. his heirs, executors,  
 and administrators, all actions, cause and causes of action, judgments,  
 suits, controversies, trespasses, debts, duties, damages, accounts, reck-  
 onings and demands whatsoever, for or by reason of any matter,  
 cause, or thing whatsoever, from the beginning of the world to the  
 day of \_\_\_\_\_ last, save and except (*the thing awarded*) under  
 the terms and in the manner prescribed in and by a certain award  
 made the \_\_\_\_\_ day of \_\_\_\_\_ in the year \_\_\_\_\_, by \_\_\_\_\_ and  
 on a reference to them of all disputes between me and the said C D.  
 In witness, &c. I have hereunto set my hand and seal this \_\_\_\_\_ day  
 of, &c.

✍ A similar release must be given by the other party; only  
 changing the names of the parties, and varying the exception as to  
 the thing awarded, so as to suit the case.

✍ Submissions to arbitration, by *indenture*, are very unusual;  
 though it may be done, as well as a submission by *deed*, which is a  
 writing under *seal*. Or it may be by writing not under seal; or by  
 mere *verbal* agreement.

## BAIL.

**BAIL** (from the French *bailer*, to deliver) signifies the delivery of a man out of custody, on the undertaking of one or more persons for him, that he shall appear at a day limited, to answer, and be justified by the law. *Summ.* 96.

*I. The difference between bail and mainprise. II. When a person may be discharged without bail. III. Who may or may not be bailed. IV. Who may bail, and the manner of it. V. Of granting bail where it ought to be denied. VI. Of refusing bail where it ought to be admitted. VII. Requiring excessive bail. VIII. Of bail by writ of habeas corpus. IX. When bail shall be required in civil actions. X. When bail shall not be required in civil actions, without the direction of a Judge or Justice. XI. Special cases, in which bail is directed by the laws of the commonwealth. XII. Offences punishable, by the laws of this commonwealth, by imprisonment, without bail or mainprise.*

### I. THE DIFFERENCE BETWEEN BAIL AND MAINPRISE.

The difference between bail and mainprise is, that mainperners are only surety, but bail is a custody; and therefore the bail may retake the prisoner, if they doubt he will fly, and detain him, and bring him before a justice, and the justice ought to commit the prisoner in discharge of the bail, or put him to find new sureties. *Summ.* 96. *Co. Law tracts* 280.

### II. WHEN A PERSON MAY BE DISCHARGED WITHOUT BAIL.

If a prisoner be brought before a justice of peace expressly charged with felony by the oath of a party, the justice cannot discharge him, but must bail or commit him. *2 Hale* 121.

But if he be charged with suspicion of felony only, yet if there be a felony at all proved to be committed, or if the fact charged as a

felony be in truth no felony in point of law, the justice of peace may discharge him. *Ibid.*

### III. WHO MAY OR MAY NOT BE BAILED.

"Those shall be let to bail who are apprehended for any crime not punishable with death, or confinement in the jail and penitentiary; and if the crime be so punishable, but only a light suspicion of guilt fall on the party, he shall in like manner be bailable: But if the crime be punishable with death, or confinement in the jail and penitentiary, and there be good cause to believe the party guilty thereof, he shall not be admitted to bail. 2 *Rev. Code* 81. But no person shall be bailed after conviction of any felony." 1 *Rev. Code* 17.

☞ For those offences punishable by confinement in the penitentiary. See title "PENITENTIARY."

### IV. WHO MAY BAIL, AND THE MANNER OF IT.

It seems to be a general rule, that so far as any persons are judges of any crime, so far they have power of bailing a person indicted before them of such crime. So may a justice of the peace bail a person arrested for felony. *Haw. B. 2. C. 15. S. 54.*

Any one justice might always in his discretion either bail or imprison one who has given another a dangerous wound, according as it shall appear from the whole circumstances that the party is most likely to live or die. *Ibid.*

A person who is to take bail may examine them on their oaths as to their sufficiency. 2 *Hale* 125.

And if a person who has power to take bail be so far imposed upon as to suffer a prisoner to be bailed by insufficient persons, either he, or any other person, who hath power to bail him, may require the party to find better sureties, and to enter into a new recognizance, and may commit him on his refusal; for insufficient sureties are no sureties. *Haw. B. 2. C. 15. S. 4.*

No person should be admitted to bail by less than two sureties, either of which should be sufficient to answer the sum in which they are bound. *Ibid.*

With respect to the power of bailing an offender sent for further trial by the court of examination, see title "CRIMINALS."

### V. OF GRANTING BAIL WHERE IT OUGHT TO BE DENIED.

"If any justice let any go at large who is not bailable, or refuse to admit to bail any who have right to be so admitted, after they shall have offered sufficient bail, or require excessive bail, he shall be amerced at the discretion of a jury." 1 *Rev. Code* 17.

An information was granted against a justice of the peace in England, for admitting a man to bail on suspicion of horse-stealing. *Str.* 1216.



## VI. OF REFUSING BAIL WHERE IT OUGHT TO BE ADMITTED.

Denying bail where it ought to be granted is a misdemeanor, not only by the statute, but also by the common law, and punishable thereby, not only by action at the suit of the party injured, but also by indictment. *Haw. B. 2. C. 15. S. 13.*

But the party should *offer* sureties. *Ibid. S. 14.*

## VII. REQUIRING EXCESSIVE BAIL.

By the declaration of rights of Virginia, article 9, it is declared, "That excessive bail ought not to be required, nor excessive fines imposed, nor cruel nor unusual punishments inflicted." The same principle is adopted in the amendments to the constitution of the United States, article 10.

## VIII. OF BAIL BY WRIT OF HABEAS CORPUS.

As the enlargement of a prisoner may in most cases be procured by writ of *habeas corpus*, it has been usual in treatises of this kind to confound that subject with the doctrine of bail. But it more properly makes a distinct title of itself.

## IV. WHEN BAIL SHALL BE REQUIRED IN CIVIL ACTIONS.

In all actions of *debt*, founded on any writing obligatory, bill or note in writing, for the payment of money or tobacco, and all actions of *covenant*, or *detinue*, the plaintiff or his attorney shall, on pain of having his suit dismissed with costs, indorse on the original writ or subsequent process the true species of action, and that appearance bail is required. 1 *Rev. Code* 78, 87.

Appearance bail is not required in actions of debt on bonds with collateral conditions. 2 *Wash.* 183.

## X. WHEN BAIL SHALL NOT BE REQUIRED IN CIVIL ACTIONS, WITHOUT THE DIRECTION OF A JUDGE OR JUSTICE.

In all actions to recover the penalty for breach of any *penal law*, not particularly directing special bail to be given, in actions of *slander*, *trespass*, *assault and battery*, actions on the case, *for trover* or other wrongs, and all *personal actions*, except those above enumerated (*viz. debt, covenant, and detinue*) the plaintiff or his attorney shall in like manner and under like penalties indorse on the original writ or subsequent process, the true species of action, "that the sheriff to whom the same is directed may be thereby informed whether bail is to be demanded on the execution thereof. 1 *Rev. Code* 77, 87.

But a judge or justice may direct bail, by indorsement on the writ. 1 *Rev. Code* 78, 87.

No bail shall be demanded of a defendant sued out of his county, until a *non est inventus* be returned therein; unless the cause of action accrued where the suit is brought: and a writ issued otherwise

without an endorsement, "no bail required," shall be *voidable*, see 1 Rev. Code, 88.

Formerly a suit could not be brought against a defendant in a district other than that in which he resided, till the return of a *non est inventus* therein. (1 Rev. Code, 77.) But now a suit may be brought in any circuit where the cause of action arose, and the defendant held to bail. See acts of 1808, page 12.

Writs issued contrary to the above laws are to be avoided by plea in abatement. See 3 Tuck. Bl. App. 38.

No special bail shall be required in any action on a penal law, unless by such law it be expressly directed. 1 Rev. Code, 106.

✎ The same summary remedy is now given to the common bail who actually pays money on account of the principal, as to securities against their principals. 1 Rev. Code, 282.

As to the plaintiff's remedy against the sheriff for taking insufficient, or for failing to take bail, when required; and the bail's and sheriff's remedy against the defendant's estate by *attachment*; also, when exceptions may be taken to bail returned by sheriff. See 1 Rev. Code; 78, 87, 88.

But if the plaintiff does not, in the first instance, except to the sufficiency of the appearance bail, he cannot afterwards object to receiving him as special bail. 1 H. and M. 22.

And after the appearance bail has defended the suit and pleaded, the defendant may at a subsequent term be admitted to appear, and give as special bail the same person who was appearance bail, file a plea, and go to trial. *Ibid*.

✎ For those persons who are privileged from arrests, and consequently cannot be held to bail, see title "ARREST."

## XI. SPECIAL CASES, IN WHICH BAIL IS REQUIRED BY THE LAWS OF THIS COMMONWEALTH.

**BALLAST.** In any suit brought for the penalties against the owner of a vessel, for unlading ballast, or casting dead bodies into the water, contrary to law. 1 Rev. Code, p. 205.

**CONVICTS.** In all actions for the penalty of \$50. for bringing any convict into this state. 1 Rev. Code, 40.

**FLOUR.** On actions for the penalties on the act to regulate the inspection of flour and bread. 1 Rev. Code, p. 231.

**GAMING.** On executing a *captas*, after judgment for unlawful gaming. 2 Rev. Code, p. 13.

**HOGSTEALING.** In all suits or informations brought against free persons for hogstealing. 1 Rev. Code, 177.

**QUARANTINE.** In suits for penalties for breach of laws of quarantine. 1 Rev. Code, p. 245.

**SAILORS, &c. sick or disabled.** In any action of debt or information brought against the master of a vessel for putting on shore any sick or disabled sailor or servant, without providing for their maintenance and cure. 1 Rev. Code, p. 205.

**SLAVES.** Against the master of a vessel or others, for carrying a slave out of the state, or removing him from one county to another,

&c. (1 *Rev. Code*, 192, 374. 2 *Rev. Code*, 84.) Against masters of vessels, for dealing with slaves. 1 *Rev. Code*, 432. 2 *Rev. Code*, 85.

**TRANSPORTING DEBTORS out of the state.** In all actions against the masters of vessels for carrying debtors out of the country, without having advertised their intention to depart, for six weeks successively, in the *Virginia Gazette*. 1 *Rev. Code*, p. 118.

## XII. OFFENCES PUNISHABLE BY THE LAWS OF THIS COMMONWEALTH, BY IMPRISONMENT WITHOUT BAIL OR MAINPRISE.

**BASTARDS.** Reputed father of a bastard child refusing to enter into a recognizance to perform the order of court, for the maintenance of the child, to be imprisoned without bail or mainprise till he comply, &c. 1 *Rev. Code*, 184. 2 *Rev. Code*, 93.

**CLERKS of COURTS**, executing their office, without taking the oath prescribed by law, forfeit fifteen hundred dollars, and suffer one year's imprisonment without bail or mainprise. 1 *Rev. Code*, 94.

**CONVICTS.** For bringing any convict into this state, three months imprisonment without bail. 1 *Rev. Code*, p. 40.

**COUNTERFEITING LETTERS, or privy tokens.** Imprisonment without bail for any space not exceeding one year. 1 *Rev. Code*, p. 45.

**MARRIAGES.** Ministers celebrating marriages without licence or publication of banns, twelve months imprisonment without bail. 1 *Rev. Code*, p. 193.

Granting false certificate of publication of banns, the same penalty as next above.

Clerk of the court granting marriage licence contrary to law. 1 *Rev. Code*, p. 195.

White persons marrying with negroes or mulattoes, six months imprisonment without bail. 1 *Rev. Code*, p. 196.

**ORDINARIES.** A person convicted of keeping a tippling house, or a second time of retailing liquors without licence; six months imprisonment without bail. 1 *Rev. Code*, p. 203.

**PERJURY.** A person guilty of it is punishable by fine not exceeding two hundred pounds; and imprisonment twelve months without bail or mainprise. 1 *Rev. Code*, p. 46.

**SLAVES.** Forging certificate of emancipation of; a fine of two hundred dollars, and imprisonment one year without bail, &c. 1 *Rev. Code*, 347.

**SMALL POX.** A person wilfully endeavouring to propagate it, contrary to law; a fine of fifteen hundred dollars, or six months imprisonment without bail, &c. 1 *Rev. Code*, 202.

**WOMAN.** Taking away a woman under the age of sixteen years, imprisonment without bail, &c. not exceeding two years. 1 *Rev. Code*, p. 196.

Taking away and deflowering, five years imprisonment without bail. 1 *Rev. Code*, 197.

*(A) Recognizance of bail in a criminal case.*

Be it remembered, that on the       day of       in the year of  
our Lord       A O, of the county of       labourer, A B, of the said  
county, labourer, and B B, of the said county, labourer, came before  
me J. P. one of the commonwealth's justices of the peace for the coun-  
ty of       and severally acknowledged themselves to be indebted to A  
G,       governor or chief magistrate of the commonwealth of Vir-  
ginia, and his successors, that is to say, the said A O,       dollars,  
and the said A B, and B B,       dollars each, to be respectively le-  
vied of their lands and tenements,\* goods and chattels, if the said  
A O shall make default in performance of the condition under-  
written.

The condition of this recognizance is such, that if the above bound  
A O shall personally appear before the commonwealth's justices  
assigned to keep the peace in and for the county of       aforesaid,  
on the       day of       then and there to answer to the common-  
wealth aforesaid, for and concerning (here recite the offence) with  
which the said A O stands charged before me, and to do and receive  
what by the said court shall then and there be ordered and adjudged,  
and shall not depart thence without the leave of the said court, then  
this recognizance shall be void, or else remain in full force and  
virtue.

*Acknowledged before me.*

The precedents for bailing an offender, after a court of exami-  
nation has been held, are reserved for title *Criminals*.

*(B) Recognizance of special bail in civil cases.*

County, to wit:

Memorandum, That upon the       day of       in the year  
of our Lord       A B, of the county of       personally appeared  
before me J P, (one of the judges of the general court, or a justice of  
the peace for the county aforesaid, *as the case may be*) and undertook  
for C D, at the suit of B P, in an action of       now depending  
in the superior court of law, for the county of       (or, in an  
action of       now depending in the court of       county) that  
in case the said C D shall be cast in the said suit, he the said C D  
will \* pay and satisfy the condemnation of the court, or render his  
body to prison in execution for the same, or that he the said A B will  
do it for him.

*(C) Special bail, in detinue.*

(See 1 Rev. Code, p. 78, sect. 26. and p. 87, sect. 20.)

(Pursue form (B) till you come to the asterisk\*, then say) restore to  
the said B P the said (describe the property sued for, according to the

\* If the recognizance be forfeited, and there be judgment thereupon, the exe-  
cution goes against the "lands and tenements, goods and chattels." This is  
said to have been the practice of the Old General Court, and is warranted by  
Rastell. See *Rastell's Entries*, folio, 346 a, pl. 5.

*specification in the writ*) or the alternative value thereof, as the court may adjudge, or that he, the said A B, will do it for him.

### (D) *Bail piece.*

County, to wit :

C D, of the parish of                      in the county of                      is delivered to bail, on a *cepi corpus*, unto A B, of the parish and county aforesaid, at the suit of B P, the                      day of                      in the year of our Lord

Special bail may be taken by any judge of the general court, or justice of the peace, in actions depending in the superior courts of law, where the court is not sitting. 1 *Rev. Code*, p. 79.

In the county courts, special bail may be taken at the quarterly sessions, or a monthly court. (1 *Rev. Code*, p. 85, sect. 10.) Or, it may be taken by any justice of the peace, when the courts are not sitting. *Ibid.* p. 88, sect. 24.

When to return the recognizance to the clerk's office, and when exceptions may be taken to the sufficiency of the bail, see the above laws.

### (E) *Bail bond, to the sheriff.*

Know all men by these presents, that we, A D, of                      and B S, of                      are held and firmly bound to H S, sheriff of the county of                      in the sum of                      of lawful money of Virginia, to be paid to the said H S, or his certain attorney, executors, administrators, or assigns; to which payment well and truly to be made, we bind ourselves, and each of us jointly and severally, our and each of our heirs, executors and administrators, firmly by these presents. Sealed with our seals, and dated this                      day of                      in the year of our Lord

The condition of this obligation is such, that if the above bound A D do appear before the judge of the superior court of law for the county of                      (or before the justices of the county court of                      ) at the court house of the said county, on &c. (*the day of the return according to the writ*) to answer to C P, of a plea of &c. (*recite the cause of action as in the writ*) then this obligation to be void, else to remain in full force and virtue.

The bail bond, or a copy thereof, must be returned by the sheriff to the clerk's office before the day of appearance. 1 *Rev. Code*, p. 78, sect. 26; p. 87, sect. 30. 2 *Rev. Code*, p. 17.

## BALLAST.

BY the laws of Virginia (1 *Rev. Code*, p. 204, sect. 1.) the court of every county or corporation, adjacent to any navigable river or creek, are directed to appoint one or more ballast-masters, residing near where vessels usually ride, to superintend the unloading of ballast within a certain district, to be ascertained by the court. Sect. 2: Directs that an oath shall be taken by the ballast-master, which prescribes his duty. Sect. 3. Inflicts a penalty on any person appointed a ballast-master, who shall refuse to serve; and provides for filling vacancies. Sect. 4. Prescribes the duties of ballast-masters; which are, that, on receiving notice from the master of a vessel, that ballast is to be discharged, he shall go on board, and attend till the whole is delivered; and having seen that it is brought on shore, and laid in some convenient place, near the vessel, where it may not obstruct navigation, or be washed into the channel, shall give a certificate to that effect to the master; for which he shall receive eighty-three cents. Sect. 5. Imposes a fine of sixty dollars, for every failure of duty by a ballast-master. Sect. 6. Directs, that the master of a vessel, having ballast to unload, shall give notice, in writing, to the ballast-master of the time; and if he shall unlade any ballast otherwise, or contrary to the orders of the ballast-master, he shall forfeit one hundred and fifty dollars for every offence. Sect. 7. Provides, that whenever a person shall die on board a vessel within this commonwealth, the master shall cause the dead body to be brought on shore, and buried, at least four feet deep, above high water mark, or be subject to a penalty of one hundred and fifty dollars. Sect. 8. In any suit brought for the penalties of this act, the defendant may be ruled to give special bail; and the clerk shall endorse on the writ, that bail is required.

### *Certificate of the ballast-master, on sect. 4.*

County, to wit:

I do hereby certify, that, pursuant to notice to me given by A B, master of the ship        now riding at        on        river, I did repair to the said ship, and there attend until I had caused the ballast on board her to be delivered out, and put on shore in such places, that the same cannot in any wise obstruct navigation, or be washed into the channel of the said river. Given under my hand this  
day of        in the year of

C D, ballast-master.

## BARRATRY.

BARRATRY is derived either from *barratta*, in the *Danish*, or *baret*, in the *Norman* language, both of which signify a quarrel or contention.

And a *barrator*, in legal acceptation, signifies, a common mover, exciter, or maintainer of suits or quarrels, either in courts or in the country. 1 *Inst.* 368. *Haw. B. l. c. 81. s. 1.*

1. *Barratry* may be in courts, by maliciously stirring up unjust actions or suits between other men. 1 *Inst.* 368.

But a person cannot be guilty of *barratry* in consideration of a single act, for the indictment must charge the defendant with being a common *barrator*. *Haw. B. l. c. 81. s. 5.*

Neither can an attorney be said to be a *barrator* in respect of his maintaining another in a groundless action, to the commencing whereof he was no way privy. *Ibid. s. 4.*

Nor shall a man be adjudged a *barrator* for any number of false actions brought by him in his own right, because in such cases he is liable to pay costs. *Ibid. s. 3.*

2. *Barratry* may be in the country. 1. By any kind of disturbance of the peace. 2. By taking and keeping possession of lands in controversy, not only by force, but also by subtilty and deceit, and most commonly in suppression of truth and right. 3. By false inventions, and sowing of calumniations, rumours, and reports, whereby discord and disquiet may grow between neighbours. 1 *Inst.* 368.

3. If the offender be a common person, he may be fined and imprisoned, and bound to his good behaviour, and if he be of any profession relating to the law, he ought also to be further punished, by being disabled to practice for the future. *Haw. B. l. c. 81. s. 14.*

4. *Barratry* and common scolding are the only offences for which a general indictment will lie, without setting forth any of the particular facts; for *barratry* is of a complicated nature, consisting in the repetition of divers acts to the disturbance of the peace, and the enumeration of them would render an indictment too prolix. For this reason it is sufficient to charge the offender generally as a common *barrator*, and before the time of trial to give the offender a note of the particular facts intended to be proved against him. Without this notice it would be impossible for a person to defend himself against so general and uncertain a charge, which may be proved by such a variety of different instances; and therefore the court will not suffer the prosecution to be brought on to trial without such notice being given to the defendant. *Haw. B. l. c. 81. B. 2. c. 25. s. 59. Peake's Ev. 7.*

An indictment of this kind may be good, without alledging the offence at any particular *place*, because from the nature of the thing, consisting in the repetition of several acts, it must be intended to have happened in several places. *Haw. B. 1. c. 8 §. 11.*

But the indictment must conclude, *against the peace, &c. Ibid. s. 12.*

### (A) *Warrant against a barrator.*

County, to wit :

To the constable, &c.

Whereas complaint hath been made before me, J P, a justice of the peace for the said county of \_\_\_\_\_ by the oath of A I, of &c. that A O, of &c. labourer, on the \_\_\_\_\_ day of \_\_\_\_\_ in the year \_\_\_\_\_ and on divers other days and times, as well before as afterwards, at \_\_\_\_\_ and at divers other places within the said county, was, and yet is, a common barrator ‡ and disturber of the peace, in moving, exciting, and maintaining divers quarrels, strifes, suits, and controversies, among the honest and peaceable citizens of this commonwealth, and in sowing of calumnies and false rumours, whereby discord daily arises among neighbours:‡ These are therefore to command you, forthwith to take the said A O, and bring him before me, or some other justice of the peace for the said county, to answer the said complaint, and further to be dealt with according to law. Witness my hand and seal, at &c.

☞ When the offender is brought before the justice, he may enter into a recognizance, with sufficient surety, for his appearance at the next court; but on his refusal, or being unable to give security, he may be committed.

### (B) *Recognizance.*

(Pursue form (A) under title "RECOGNIZANCE," then add the following condition:)

The condition of this recognizance is such, that if the above bound A O shall personally appear before the commonwealth's justices of the peace, at the next court to be held for the county of \_\_\_\_\_ to answer to such matters as shall be objected against him, by A I, of &c. concerning him, the said A O's, being a common barrator (*take in between these marks ‡ ‡, in form (A) under this title*): and if he, the said A O, do not depart without leave of the court, then this recognizance to be void, else to remain in full force.

### (C) *Mittimus, for want of sureties.*

County, to wit :

To the keeper of the jail of the said county.

I send you herewith the body of A O, of the county aforesaid, labourer, apprehended by my warrant, and brought before me, and charged on the oaths of A I, of &c. and B I, of &c. of being a common barrator (*take in between these marks ‡ ‡, in form (A) under this*



*title*): And you are hereby required to receive the said A O into your jail and custody, and him there safely to keep, until he shall procure sufficient surety to be bound with him in a recognizance to the governor, or chief magistrate of this commonwealth, that is to say, himself in dollars, and his surety in conditioned for his personal appearance at the next court to be held for the county of to do what shall then and there be enjoined him by the said court, and in the mean time to be of good behaviour. Witness my hand and seal, at &c.

*(D) Recognizance of the witnesses:*

Memorandum, That on this day of in the year A W, of and B W, of came before me, J P, a justice of the peace for the county aforesaid, and personally acknowledged that each of them is indebted to D G, governor or chief magistrate of the commonwealth of Virginia, and his successors, in dollars, lawful money, to be levied of their goods and chattels, lands and tenements, respectively; upon condition, that if they, the said A W, and B W, do personally appear before the commonwealth's justices of the peace, at the next court to be held for this county, and do then and there prefer, or cause to be preferred, a bill of indictment against A O, of labourer, for being a common barrator, wherewith he is by them charged before me, and do also then and there give evidence concerning the same to the jurors who shall inquire thereof, on behalf of the said commonwealth, and upon the trial of the said A O for the same, then this recognizance to be void, else to remain in full force.

Acknowledged before me.

*(E) Indictment for being a common barrator.*

County, to wit:

The jurors of the commonwealth, for the body of the county aforesaid, upon their oath do present: That A O, late of the county aforesaid, labourer, on the day of in the year and on divers other days and times, as well before as afterwards, was, and yet is, a common barrator; and that he the said A O, on the said day of and on divers other days and times, at the county aforesaid, divers quarrels, strifes, suits, and controversies, among the honest and quiet citizens of the said commonwealth, then and there did move, procure, stir up, and excite, to the evil example of all others in the like case offending, and against the peace and dignity of the commonwealth.

## BASTARDS.

- I. Who shall be deemed a bastard. II. Proceedings against the reputed father of a bastard child. III. Capacity of a bastard as to inheritance. IV. Concealing the death of a bastard child.*

### I. WHO SHALL BE DEEMED A BASTARD.

THE word *bastard* is derived from the *Saxons*, and compounded of *base*, ignoble, and *start* or *steort*, a rise or original. Among those of the people of England, who retain much of the ancient Saxon dialect, it is still pronounced *bastart*, denoting a person sprung from a vile or spurious origin; as an *upstart* is a person suddenly risen from a mean extraction in general. 1 *Burn's Just.* 179.

1. Lord Coke says, we term all bastards that are born out of lawful marriage. (1 *Inst.* 244. a.) But, by the laws of *Virginia*, "where a man having by a woman one or more children, shall afterwards intermarry with such woman, such child or children, if recognized by him, shall be thereby legitimated. The issue also, in marriages deemed null in law, shall nevertheless be legitimate." 1 *Rev. Code*, p. 170. sect. 19.

¶ This act has received a very liberal construction by our supreme court of appeals. See the case of *RICE v. EFFORD*. 3 *H. & M.* 225, and the cases of *STONES v. KEELING*, *ibid.* 228, note, and *SLEIGHS v. STRIDER*, *ibid.* 229, note.

2. By the old rules of the common law, if the husband were *within the four seas*, that is, within the jurisdiction of the country, and the wife had issue, the presumption was, that the child was the issue of the husband, and no proof could be admitted to prove the child a bastard, unless the husband had an apparent *impossibility* of procreation; as if the husband be but eight years old, or under the age of puberty, or having some other equally palpable defect. *Co. Lit.* 244. a. *Jenk. Cent.* p. 10, case 18. 2 *Peake's Ev.* 357.

It is now, however, held, that this presumption may be rebutted by proof of *non access*, as well as of total inability of procreation by the husband; but still very strong evidence is required of these facts; if the husband ever had access to his wife, or his habit of body was only such as to make it *improbable* that he should beget a child, and not to render such an event wholly impossible, verdicts have generally been in favour of legitimacy. 2 *Peake's Ev.* 358. 4 *Term Rep.* 356. 2 *Str.* 940.

An issue was directed out of chancery, in the case of *Pendrell* and *Pendrell*, to try whether the plaintiff was heir at law to one *Thomas Pendrell*. It was agreed that the plaintiff's father and mother were married, and cohabited for some months; that they afterwards parted, she staying in *London*, and he going into *Staffordshire*; that at the end of three years, the plaintiff was born. And there being some doubt upon the evidence, whether the husband had not been in *London* within the last year, it was sent to be tried. And the plaintiff rested at first upon the presumption of law in favour of legitimacy, which was encountered by strong evidence of no access. And it was agreed by court and counsel, on the trial at *Guildhall*, before lord chief justice *Raymond*, that the old doctrine of being within the four seas was not to take place, but the jury were at liberty to consider of the point of access, which they did, and found against the plaintiff. And the court of chancery acquiesced. 2 *Str.* 925.

See also, on the above doctrine, the cases of the *king v. inhabitants of Bedall*. (2 *Str.* 1076. *Andr.* 9. s. c.) and the *king v. Abbot Alberton*. 1 *Ld. Raym.* 395, 396.

3. But the *non access* of the husband ought to be proved otherwise than upon the wife's oath; as in the case of *K. and Reading*. The defendant, *Reading*, was adjudged to be the putative father of a bastard child, begotten of the wife of one *Almont of Sherborne*. The said woman, on the appeal, gave evidence that the said *Reading* had carnal knowledge of her body, in or about August, 1732, and several times since; and that her husband had no access to her from May, 1731, to the time of her examination in that court, being the third of October, 1733, and that the said *Reading* was the father of the said child. And the question in *K B.* was, whether the wife in this case should be admitted as an evidence for or against her husband, and to bastardize her own child. And the whole court were of opinion, that the wife could be a witness to no other fact but that of incontinence, and that this she must be a witness to from the necessity of the thing, but not to the absence of her husband, which might properly be proved by other witnesses; and likened it to the case of hue and cry, where the person robbed shall be admitted a witness of the fact of robbery, but not to prove any other matter relating thereto, as in what place the robbery was committed, and the like. *Ca. temp. Hardw.* 73, 79. See also, *Cowp.* 594. 1 *Wils.* 340. S. P.

Under what circumstance the evidence of the parents, or their declarations, they being dead, may be received, to prove the legitimacy of their children, see a valuable note to *Nolan's* edition of *Strange*, vol. 2, p. 925, note (2.)

4. The law has appointed no exact time for the birth of legitimate issue, by the widow, after the death of her husband. In the case of *Alsop* and *Bowtrell*, the question was, whether the woman being delivered of a child forty weeks and nine days after the death of her husband, such child should be deemed a bastard. It was proved that she suffered very great abuse from the father of her deceased husband, who caused her to lie in the streets; and three physicians made oath, that the child was born in convenient time to be the child of the party who died; and that the usual time for a woman to go with child is nine months and ten days; to wit, solar months, at thirty days to the month.

and not lunar months; and that by reason of the want of strength in the woman or the child, or by reason of ill usage, she might be a longer time, to wit, to the end of ten months or more. And the physicians farther affirmed, that a perfect birth may be at seven months, according to the strength of the mother or child, which is as long before the time of the proper birth. And by the same reason it may be as long deferred by accident, which is commonly occasioned by infirmities of the body or passions of the mind. And the child was adjudged to be legitimate. *Cro. Jac.* 541. See *Co. Lit.* 123, b. and *Hargr.* notes 1 and 2.

5. If the issue be born within a month, or a day, after marriage, between parties of full lawful age, the child is legitimate. *Co. Lit.* 244. a.

6. If the husband and wife voluntarily separate, the issue shall be deemed legitimate, till the contrary be proved. 1 *Salk.* 123.

## II. PROCEEDINGS AGAINST THE REPUTED FATHER OF A BASTARD CHILD.

If a single woman, not a servant or slave, be delivered of a bastard, which is or shall be likely to become chargeable to the county, and shall, upon examination to be taken in writing, upon oath, before any justice of the county, charge any person, not being a servant, with being the father, any justice of the county wherein the person charged may be a resident or inhabitant, may, on application of the overseers of the poor, or any one of them, of the county wherein such child shall be born, issue his warrant for apprehending and bringing the person so charged before such justice, or any other justice of the county wherein he is a resident or inhabitant; and such justice shall commit him to jail, unless he will enter into a recognizance with sufficient security (in a sum not less than fifty, nor more than two hundred dollars, (2 *Rev. Code*, p. 76. sect 3.) conditioned to appear at the next court of the county, and abide by the orders thereof. And if the court, upon the circumstances, shall adjudge the person charged to be the father, and that the child is likely to become chargeable to the county, they may provide for its maintenance, by charging the father with the payment of such sums of money, and in such proportions as they may think proper, to continue while such child is likely to be chargeable to the county. And the father shall enter into a recognizance, with sufficient security, before the court, payable to the governor and his successors, to perform such orders of the court. And if the father shall make default in the payment of the money so charged upon him, to the overseers of the poor, the court before whom such recognizance shall be entered into shall, on the motion of the said overseers, or any one of them, and ten days previous notice, enter judgment and award execution for the money, as the same may become due, against the father, his executors or administrators. And if the father shall refuse to enter into such recognizance, he shall be committed to jail, until he comply, or discharge himself by taking the oath of an insolvent debtor, or until the overseers consent to his discharge; and the estate contained in his

schedule shall, by order of the court, be applied towards indemnifying the county. 1 Rev. Code, p. 183, sect. 23.

☞ The same proceedings are authorised against the reputed father of a bastard child, in corporate towns. See 2 Rev. Code, p. 92, 93.

No justice may send for a woman, before she shall be delivered, in order to her being examined concerning her pregnancy, or compel her to answer any questions relating thereto. 1 Rev. Code, p. 184, sect. 24.

☞ As to binding bastards apprentices, see title "APPRENTICES."

*(A) Examination of the woman.*

County, to wit:

The examination of A M, of                      in the said county, taken upon oath before me, J P, a justice of the peace for the county aforesaid, this                      day of                      in the year of our Lord who saith, that on the                      day of                      last past, at                      in the county aforesaid, she, the said A M, was delivered of a (male, or female, *as the case may be*) bastard child, and that the said bastard child is likely to become chargeable to the said county, and that A F, of the said county, did get her with child of the said bastard child.

A M.

Taken and signed, the day and year }  
above written, before me, J P. }

*(B) Warrant against the reputed father.*

County, to wit:

To                      or any other constable of                      county.

Whereas A M, of                      in the said county, single woman, hath by her examination taken in writing upon oath before me, J P, one of the commonwealth's justices of the peace for the county aforesaid, declared, that on the                      day of                      now last past, at                      in the county aforesaid, she, the said A M, was delivered of a (male) bastard child, and that the said bastard child is likely to become chargeable to the said county, and hath charged A F, of                      in the said county, labourer, of having gotten her with child of the said bastard child: And whereas O P, one of the overseers of the poor in the county aforesaid, in order to indemnify the said county in the premises, hath applied to me to issue my warrant for apprehending the said A F: I do therefore hereby command you, immediately to apprehend the said A F, and to bring him before me, or some other justice of the peace for the said county, to find sufficient security in a sum not less than fifty nor more than two hundred dollars, for his personal appearance at the next court, to be held for the said county of                      and then and there to abide by and perform the order of the said court herein, in pursuance of the act of the General Assembly, entitled "An act providing for the poor, and declaring who shall be deemed vagrants." Given under my hand and seal, this                      day of                      in the year

☞ If the bastard child be born in one county, and the reputed father be a resident or inhabitant of another, application must be made by an overseer of the poor of the county wherein the child was born, to a justice of the county where the father resides, for a warrant to apprehend him. In such cases the examination of the woman should be taken before a justice of the county wherein the child was born, and transmitted to some justice of the county where the father resides, together with an application from an overseer of the poor of the county wherein the child was born, for a warrant to apprehend the reputed father. It would be well to accompany these papers with a certificate from the clerk of the court, that the person applying for the warrant is duly elected and qualified as an overseer of the poor of that county.

No particular form of application seems necessary; it will be sufficient to state the fact of the birth and parentage of the bastard child, as mentioned in the examination, and to require a warrant for the apprehension of the father, in order to indemnify the county wherein the child was born; the applicant stating himself to be one of the overseers of the poor of the county.

☞ Where the warrant issues in one county, grounded on an examination of the woman, and the application of an overseer of the poor of another, the warrant and subsequent proceedings must state that fact. If the reputed father be arrested, he may enter into a recognizance to appear at the next court.

### (C) *The Recognizance.*

county, to wit.

Memorandum, That upon this      day of      in the year of our Lord      A F, of the county of      labourer, A B, of the said county, labourer, and B B, of the said county, labourer, personally appeared before me J P, a justice of the peace for the county aforesaid, and acknowledged that they do owe to A G, governor or chief magistrate of the commonwealth of Virginia, and his successors, to wit, the said A F, the sum of      dollars, and the said A B, and B B, each severally in the sum of      dollars, of lawful money of Virginia; to be levied of their respective goods and chattels, lands and tenements, to the use of the said commonwealth of Virginia, if default should be made in performance of the condition here underwritten.

The condition of this recognizance is, that whereas A M, of the county of      (or of the said county, *as the case may be*) single woman, hath by her examination on oath before me (or before one of the commonwealth's justices of the peace for the county of      *as the case may be*) declared that on the      day of      last past, she was delivered of a bastard child in the county of      (or in the county aforesaid) which is likely to become chargeable to the said county, and hath charged the above bound A F with having gotten her with child of the said bastard child: Now if the said A F shall personally appear before the commonwealth's justices of the peace, at the next court to be held for the county of      and shall abide by and perform the order or orders of such court, as shall be

made in the premises, then this recognizance to be void, otherwise to remain in full force.

Acknowledged before me.

If the reputed father refuses to enter into a recognizance, the justice may commit him.

(D) *Mittimus.*

To the sheriff, or keeper of the jail of the county of  
county to wit.

I herewith send you the body of A F, of this county, labourer, who was this day brought before me J P, one of the commonwealth's justices of the peace for the said county, being charged on oath by A M, of the county aforesaid, single woman, to have gotten her with child, of a bastard child, of which she hath been lately delivered within the said county, and which child is likely to become chargeable to the said county; and the said A F, labourer, having refused, before me, to find sufficient security for his appearance at the next court to be held for this county, to answer the said charge: These are, therefore, in the name of the commonwealth, to command you to receive the body of the said A F into your custody, and him safely to keep in the common jail, until he shall thence be discharged by due course of law. Herein fail not at your peril. Given under my hand and seal, &c.

### III. CAPACITY OF A BASTARD AS TO INHERITANCE.

By the common law, a bastard could *inherit* nothing (1 *Bl. Com.* 458) but by Virginia laws (1 *Rev. Code*, p. 169) "Bastards shall be capable of inheriting, or of transmitting inheritance on the part of their mother, in like manner as if they had been lawfully begotten of such mother."

For more concerning bastards at common law, see *Co. Lit.* 3. 6. *Co.* 65. 3 *Salk.* 66. 1 *Dyer*, 373. *Nay*, 159. 3 *P. Wms.* 33. 2 *Bl. Com.* 505.

### IV. CONCEALING THE DEATH OF A BASTARD CHILD.

This was declared to be murder by 9 *Annæ*, (1710) *chap. II. §. 59.* of the edition of 1769; which law was nearly copied from the statute of England 21. *Jac. I. c. 27.*

By these statutes a new felony was not created, but the *act of concealment* was made undeniable evidence of a felony; therefore the indictment need not be drawn specially, or conclude against the form of the statute. *Haw. B. 2. c. 46. s. 43.*

Formerly the bare attempt to conceal the death of a bastard child was held conclusive evidence of murder. *Ibid.* But now some kind of presumptive evidence is necessary that the child was born alive. 4 *Bl. Com.* 198.

Whether the legislature of *Virginia* intended to abolish the distinction between this offence and the common cases of murder, or whether it was a mere omission in them, it is difficult to determine, but so it is.

that these statutes have not been published in the *Revised Code*, printed in 1794, or 1803.

It would seem, however, from the rules of legal construction, and from the principle established by the high court of chancery in *Virginia*, that the *act of 9 Ann.* is still *in force* ;\* not having been expressly repealed. See *Wythe's Chancery Decisions*, 33. *Harrison and al. v. Allen*.

BATTERY, see ASSAULT, &c.

BEEF, see PORK, &c.

\* Since the publication of the first edition of this work, an opinion has been expressed by a learned judge, that the legislature, in 1792, may be presumed to have so far acted upon the draught of a bill containing the clauses of the act of 1710, making it murder to conceal the death of a bastard child, 'as to manifest an intention to repeal that law ;' though he admits that it has been decided by judges, for whose opinions he entertains the highest respect, that the act is still *in force*. See 4 *Tucker's Blacks*. 358, note 23. Amidst this conflict of opinion, on a subject of so much importance, I have endeavoured to give it a careful examination, and the more I have investigated it, the more am I confirmed in my first impressions, *that the act of 1710 is still in force*.

At the session of 1789, an act passed providing for a new revision of our laws. (See 2 *Rev. Code, App. No. IX.* p. 104.) By a resolution of the General Assembly of the 29th of November, 1791, the committee of revisors were informed that it was the intention of the legislature, 'that the several laws then existing on the same subject should be consolidated into single bills, but that no new matter should be introduced into the system.' (See 2 *Rev. Code, App. No. IX.* p. 113.) The revised bills thus consolidated, from existing laws, were reported by the committee to the executive on the 23d of June, 1792, and were laid before the General Assembly at the next session. The act in question was continued, under the title of '*A Bill concerning bastards ; and to prevent the destroying and murdering of bastard children.*' (See *Revised Bill of 1792, vol. 1.* p. 161.) On the third of December, 1792, a bill was brought in, under the above title, and referred to a committee of the whole house. (See *Journal H. D.* 1792, p. 159.) On the 7th of December the bill was taken up in committee of the whole house, and reported by the chairman, with several amendments, and ordered to lie on the table. (*Journal H. D.* p. 169.) On the 15th of December, the bill was called up, the amendments reported by the committee agreed to, and the bill ordered to be engrossed and read a third time (*Journal H. D.* p. 190) and on the 17th of December, it passed the House of Delegates, under the title of '*An act concerning bastards,*' the title having been amended. But the bill was never returned from the Senate. It is stated, on the authority of a gentleman who held a distinguished place in the Senate, during the session of 1792, that the bill, as sent from the House of Delegates, was rejected in the Senate, with a view to get clear of the law. But surely it must have occurred to that body, that an existing law could not be repealed in that way. Had the bill, for the first time, been introduced into the House of Delegates at that session, the Senate might have prevented it from becoming a law, by rejecting it ; but it being a mere repetition of an existing law, not limited in its duration, the only mode in which the Senate could have manifested an intention to repeal it, would have been by passing a law to that effect.



## BIGAMY.

The term *Bigamy*, which, in its literal sense, means the having of wives, at different times, and successively (3 *Inst.* 88.) is corrupted for *polygamy*, or having a plurality of wives at once. 4 *Bl.* 163.

any person or persons within this commonwealth, being married, shall hereafter marry, do, at any time, marry any person or persons, the former husband or wife being alive, every such offence shall be felony; and the parties so offending shall receive like proceedings, &c. within this commonwealth, as if the offence had been committed in the county where such person shall be apprehended. *Provided*, that this act shall not extend, 1st, to any person whose husband or wife shall be continually remaining beyond the seas by the space of seven years together; or, 2dly, where the husband or wife shall be absent from him or herself, the one from the other, by the space of one year, in any part within the United States of America, the one without knowing the other to be living within that time; or, 3dly, to such persons as are, or shall be at the time of such marriage, divorced by lawful authority; or, 4thly, to any person where the former marriage hath been, or hereafter shall be, by lawful authority, declared void and of no effect; or, 5thly, to persons where the marriage is between persons within the age of consent. No attainder for this offence to work corruption of blood or forfeiture of estate. 1 *Rev. Code*, p. 195. *sect.* 14. This offence being within the benefit of clergy, shall be punishable by confinement in the penitentiary, for a period not more than six months, nor more than two years. See 1 *Rev. Code*, p. 195. *sect.* 13.

The above act agrees substantially with the statute (1 *Jac.* 1. c. 11) under which it has been held that the party is not deprived of the benefit of the first exception, even if he or she have notice that the other is alive. See 1 *Hale* 693.

The act extends to a marriage *de facto*, though it be not a marriage *de jure*. 3. *Inst.* 88.

either party be within the age of consent, the fifth exception extends to both. (1 *Hale* 694.) And the age of consent is sixteen years in females, and fourteen in males. 3. *Inst.* 88.

The first wife shall not be admitted as a witness against her husband, because she is the true wife; but the second may, for she is indeed no wife at all; and so vice versa, of a second husband. (4 *Bl. Com.* 164.) In prosecutions for bigamy, it has been held that a marriage in fact must be proved. (*Dictum per Lord Mansfield* in *1 Burr.* 2059.)

But see 1 *East's Cr. L.* 470, *Truman's Case*, where proof of cohabitation, and of the defendant's acknowledgment of a marriage in Scotland, backed by proceedings in a court of law for the irregularity of such marriage (it being nevertheless

good under that law) were admitted in evidence; and the above opinion of Lord Mansfield is considered a mere obiter dictum.

### (A) Warrant for Bigamy.

to wit.

Whereas information hath been given to me, J P, a justice of the peace for the county aforesaid, by the oath of A I, that A O, of, &c. hath lately intermarried with E A, of, &c. he the said A O being at the same time a married man, his former wife being alive, contrary to the act of the General Assembly in that case made and provided: These are, therefore, in the name of the commonwealth, to command you to take the said A O, and bring him before me, or some other justice of the peace for the county aforesaid, to answer the said charge, and further to be dealt with according to law. Given under my hand and seal, at, &c. this day of in the year . . .

*If a light suspicion of guilt, only, fall on the party, he or she may be bailed. See BAIL. Div. III.*

### (B) Recognizance of Bail.

*Pursue form (A) under title 'RECOGNIZANCE,' then add the following condition.)*

The condition of the above recognizance is such, that if the above bound A O shall personally appear before the commonwealth's justices of the peace for the county of on the day of at a court by them to be held, at the court house of the said county, for the examination of the said A O, then and there to answer such matters and things as shall be objected against him on behalf of the commonwealth, concerning his the said A O's having lately intermarried with E A, of, &c. he the said A O being at the same time a married man, his former wife being alive; and if the said A O shall not depart thence without leave of the court, then this recognizance to be void, &c.

*If there be good grounds to believe the party guilty, he or she cannot be bailed. See 'BAIL.' Div. III.*

### (C) Mittimus.

county to wit.

To A C, constable, and to the keeper of the jail of the said county. Whereas E A, otherwise called E B, of, &c. hath been brought before me J P, one of the justices of the peace for the county aforesaid, charged on the oath of A I, of, &c. with having married a certain W B, of, &c. she the said E well knowing that the said W B was at the time lawfully married to another wife, and that his said wife was in full life, contrary to the act of the General Assembly in that case made and provided: These are, therefore, to command you, the said constable, to convey the said E A, otherwise called E B, forthwith to the jail of the said county of and deliver her to the keeper thereof; and you the said keeper are hereby

required to receive the said E into your jail and custody, and her safely keep, till she shall be thence delivered by due course of law. Given under my hand and seal, at, &c. this            day of            in the year            .

☞ The above form may easily be varied to suit the case of a man committed for marrying another woman, his former and lawful wife being alive.

*(D) Indictment for having two wives at one and the same time.*

county, to wit.

The jurors for the commonwealth, upon their oaths, do present, That A O, late of the county of            yeoman, on the            day of            in the year            at the county of            did marry one A W, spinster, and her, the said A W, then and there had for his wife; and that the said A O, afterwards, to wit, on the            day of            in the year            with force and arms, at the said county of            feloniously did marry and take to wife one B W, spinster, and to the said B W was then and there married (the said A W, his former wife, being then living and in full life) against the form of the statute in such case made and provided, and against the peace and dignity of the commonwealth. \* And the jurors aforesaid, upon their oaths aforesaid, do further present, That the said A O, afterwards, to wit, on the            day of            in the year            last aforesaid, was apprehended and taken in the said county of            for the felony aforesaid.

*(E) Indictment for having two husbands, at one and the same time.*

county, to wit.

The jurors for the commonwealth, upon their oaths, do present, That *Elizabeth*, the wife of A B, late of the county of            planter, on the            day of            in the year of our Lord            being then married, and then the wife of the said A B, with force and arms, at the county of            did feloniously marry and take to husband C D, of            (the said A B, her husband, being then alive) against the form of the statute in such case made and provided, and against the peace and dignity of the commonwealth. And the jurors aforesaid, upon their oath aforesaid, do further present, That the said *Elizabeth* heretofore, to wit, on the            day of            in the year            at the county of            by the name of *Elizabeth* C, did marry the said A B, and him the said A B then and there had for her husband; and that she the said *Elizabeth* being married, and the wife of the said A B, afterwards, to wit, on the            day of            in the year            with force and arms, at the said county, feloniously did marry and take

\* This part may be left out, when the prisoner is taken where the felony is committed.

to her husband the said C D, of (the said A B, her former husband, being then alive) against the form of the statute in such case made and provided, and against the peace and dignity of the commonwealth.

NOTE ...In an indictment for bigamy a marriage in fact must be proved, presumption by cohabitation, &c. is not sufficient. 4 Burr. 2059.

## BLASPHEMY.

IT must afford real pleasure to every friend to civil and religious liberty, to be informed that the acts which have hitherto, by law, constituted the crime of *blasphemy*, are now considered as mere speculative topics, which every citizen is authorised freely to discuss; and that the several laws imposing such severe penalties on the offenders, which have disgraced the code of almost every civilized nation in Europe, and were implicitly adopted in Virginia, prior to the American revolution, are now entirely done away by that bulwark of our religious rights, the act '*establishing religious freedom*': an act which deserves to be translated into every language in the world, and to be deeply impressed on the mind of every citizen. The crime of *blasphemy* then, as it has been heretofore designated by law, no longer exists, as a civil offence. See *Bill of Rights of Virginia*, Art. 16. The '*Act for establishing religious freedom*.' 1 Rev. Code, p. 29. See also, 1 Rev. Code, p. 388. Const. U. S. Art. 6. Amend. Const. U. S. Art. 3.

BREAD, see FLOUR, &c.

BRIBERY, see EXTORTION.

## BUGGERY.

1. BUGGERY, from the *Italian Bugarone* (the vice being said to have been first introduced into England by the Lombards from Italy) is defined by lord Coke to be a detestable and abominable sin amongst christians, not to be named, committed by carnal knowledge, against the ordinance of the creator, and order of nature, by mankind with mankind, or with brute beast, or by woman kind with brute breast (3 Inst. 58) and in support of the last part of this definition, he mentions the case of a great lady in England, who cohabited with a Baboon, and conceived by it. See 3 Inst. 59.

2. To constitute this offence, there must be *penetratio*, that is, *res in re*, either with mankind, or with beast, but the least penetration maketh it carnal knowledge. 3 Inst. 59.

*Emissio seminis* maketh it not buggery, but is an evidence, in case of buggery, of penetration. *Ibid.*

5. In this offence there may be accessories both before and after the fact; but those who are present, aiding and abetting any to do the act, though the offence be personal, and to be done by one only, are, together with the one who doth the act, principals. (*Ibid.* & 1 *Hale* 670.) Accessories before and after were not excluded from clergy. 1 *Hale* 670.

4. If the party buggered be within the age of discretion (which is generally reckoned the age of fourteen) it is no felony in him, but in the agent only. But if both be of the age of discretion, it is felony in the agent and consentient. 3 *Inst.* 59. 1 *Hale* 670.

5. Buggery was formerly punished with death, without benefit of clergy (see 1 *Rev. Code*, p. 179) but it being an offence *thus punishable*, and not specially provided for in the act 'to amend the penal laws of this commonwealth,' passed in 1796 (see 1 *Rev. Code*, p. 355) it is now, by virtue of the act of 1799 (1 *Rev. Code*, p. 402) punishable by confinement in the *penitentiary*, for a period not less than one, nor more than ten years.

For the honour of human nature, it must be observed, that this crime is seldom committed. Should a magistrate, however, have occasion to act in his official character, in such cases, he may easily adapt the precedents of *warrants*, &c. to be found under title CRIMINALS, to the case of *Buggery*, observing to describe the offence, as in the following indictment.

### *Indictment for Buggery.*

county, to wit.

The jurors for the commonwealth, for, &c. upon their oath do present, that of the county of aforesaid, labourer, not having the fear of God before his eyes, nor regarding the order of nature, but being moved and seduced by the instigation of the devil, on the day of in the year of our Lord with force and arms, at the county aforesaid, in and upon\* one a youth about the age of years, then and there being, feloniously did make an assault, and then and there feloniously, wickedly, diabolically, and against the order of nature, had a venereal affair with the said and then and there carnally knew the said and then and there, feloniously, wickedly, and diabolically, and against the order of nature, with the said did commit that detestable and abominable crime of buggery (not to be named amongst christians) to the great displeasure of Almighty God, to the great scandal of all human kind, against the form of the statute in such case made and provided, and against the peace and dignity of the commonwealth.

\* If for *bestiality*, say, upon a certain mare, cow, &c. (as the case may be) feloniously, wickedly, diabolically, &c.

# BURGLARY.

## *I. What is burglary. II. How it is punished.*

### I. WHAT IS BURGLARY.

1. THE word *Burglary* is thought to have been brought into England by the Saxons, from Germany, in whose language *burg* signifies a house, and *larron* a thief, probably from the Latin *latro*.

2. Burglary is a felony at common law, in breaking and entering the mansion-house of another, in the night, with intent to commit some felony within the same, whether the felonious intent be executed or not. *Summ.* 79. 2 *East's Cr. L.* 484.

BREAKING.....Every entrance into the house by a trespasser is not a breaking in this case, but there must be an actual breaking. As if the door of a mansion-house stand open, and the thief enter, this is not a breaking. So it is, if the window of the house be open, and a thief with a hook or other engine draweth out some of the goods of the owner, this is no burglary, because there is no actual breaking of the house. But if the thief breaketh the glass of the window, and with a hook or other engine draweth out some of the goods of the owner, this is burglary, for there was an actual breaking of the house. 3 *Inst.* 64.

The breaking and entry need not be both done at once; for, if a hole be broken one night, and the same breakers enter the next night through the same, they are burglars. 4 *Bl. Com.* 226.

If a thief come down a chimney, it is a burglarious entry, because it is as much inclosed as the nature of the thing will admit of. 4 *Bl. Com.* 226. 1 *East. Cr. L.* 485.

The breaking a window, taking a pane of glass out, by drawing or bending the nails or other fastening, the drawing a latch where the door is not otherwise fastened, picking open a lock with a false key, putting back the lock of a door or fastening of a window with an instrument, turning the key where the door is locked on the inside, or unloosing any other fastening which the owner has provided; are all instances of breaking. 1 *Hale* 552. 1 *East. Cr. L.* 487.

So also, to knock at a door, and upon opening it, to rush in with a felonious intent, or, under pretence of taking lodgings, to fall upon the landlord and rob him; or to procure a constable to gain admittance, in order to search for traitors, and then to bind the constable and rob the house; all these entries have been held burglarious, though there

was no actual breaking : for the law will not suffer itself to be trifled with by such evasions, especially under the colour of legal process. 4 *Bl. Com.* 226.

So, if a person meditating a robbery raise the hue and cry, and bring the constable to the house, to whom the owner opens the door, and then the thief enters, and binds the constable and robs the house, it is burglary. 1 *East. Cr. L.* 485.

So, where a person knowing that the family were absent from the house, prevailed on the boy who kept the key to open the door, under the promise of a pot of ale ; and being let into the house, sent the boy for the ale, and while he was gone robbed the house. This being done in the night, it was held burglary. 1 *East. Cr. L.* 485.

And so, if a servant opens and enters his master's chamber door with a felonious intent ; or if any other person, lodging in the same house, or in a public inn, opens and enters another's door, with such evil intent, it is burglary. Nay, if the servant conspires with a robber, and lets him into the house by night, this is burglary in both ; for the servant is doing an unlawful act, and the opportunity afforded him, of doing it with greater ease, rather aggravates than extenuates the guilt. 4 *Bl. Com.* 227.

A servant lay in one part of the house and his master in another ; between them was a door at the foot of the stairs, which was latched. The servant, in the night, drew the latch and entered the master's chamber, in order to murder him ; held burglary. 1 *East. Cr. L.* 488.

So, where one of the servants in the house, opened his lady's chamber door (which was fastened with a brass bolt) with design to commit a rape ; it was ruled to be burglary. 1 *Stra.* 481.

So, where a hatch-way to an upper floor was inclosed by folding doors, which fell over it, and remained closed by *their own weight*, but without any interior fastening, it was held a breaking to raise them ; and the prisoner entering thereby a mill, which was part of the mansion-house, it was ruled burglary. 1 *East. Cr. L.* 487.

If the thief enter by the open door, and in the house break a trunk or box which was locked, this is no breaking to constitute burglary, because such things are no part of the house. 1 *East. Cr. L.* 488. *Post.* 108. *Kely.* 59.

At a meeting of the judges upon a special verdict, in January, 1690, they were divided upon the question, whether breaking open the door of a *cupboard* let into the wall of the house was burglary or no. Upon which Mr. *Poster* observes, that with respect to cupboards, presses, lockers, and other fixtures of the like kind, it seemeth that, in favour of life, a distinction ought to be made between cases relating to mere property, and such wherein life is concerned. In questions between the heir or devisee, and the executor, those fixture smay with propriety enough be considered as annexed to and parts of the freehold. The law will presume, that it was the intention of the owner, under whose bounty the executor claims, that they should be so considered ; to the end that the house might remain to those who by operation of law, or by his bequest, should become entitled to it, in the same plight he put it, or should leave it, entire and undefaced. But in capital cases, it seemeth, that such fixtures, which merely supply the place of chests

and other ordinary utensils of household, should be considered in no other light than as mere moveables, partaking of the nature of those utensils, and adapted to the same use. *Post.* 108-9.

There may also be a breaking in law, where, in consequence of violence commenced or threatened, in order to obtain entrance, the owner, either from apprehension of the force, or with a view more effectually to repel it, opens the door, through which the robbers enter. (1 *East. Cr. L.* 486.) But if the owner only throw out his money to those who assault his house, it is not burglary; though if the money were taken up in the owner's presence, it would be robbery. 1 *East. Cr. L.* 486.

In the case of *Joshua Cornwall*, who was indicted with another person for burglary, it appeared, that he was a servant in the house where the robbery was committed, and in the night time opened the street door, and let in the other prisoner, and shewed him the sideboard, from whence the other prisoner took the plate; and the defendant opened the door and let him out; but the defendant did not go out with him, but went to bed. Upon the trial it was doubted whether this was burglary in the servant, he not *going out* with the other. But afterwards, at a meeting of all the judges at Sergeants Inn, they unanimously agreed, that it was burglary in both, and not to be distinguished from the case where one watches at the street end, while the other goes in and commits the burglary, which hath often been ruled to be burglary in both: and upon report of this opinion the defendant was executed. 2 *Str.* 881.

AND ENTERING....It is deemed an entry when the thief breaketh the house, and his body, or any part thereof, as his foot, or his arm, is within any part of the house; or when he putteth a gun into a window which he hath broken, or into a hole of the house which he hath made, of intent to murder or kill, this is an entry and breaking of the house; but if he doth barely break the house, without any such entry at all, this is no burglary, for it must be *broken and entered*. 3 *Inat.* 64.

Thieves came by night to rob a house; the owner went out and struck one of them; another made a pass with a sword at persons he saw in the entry; and in so doing his hand was over the threshold; this was adjudged burglary by great advice. 1 *East. Cr. L.* 490.

So, putting a hook to steal, or a pistol to kill, within the door or window, though the hand be not in, is an entry. *Ibid.*

To discharge a loaded gun into a house is considered an entry, (*Haw. B. l. c.* 38. s. 7.); though lord *Hale* doubted on this point. (See 1 *Hale* 555.) But the modern opinions seem to be, that it is an entry. 1 *East. Cr. L.* 490.

Any the least degree of entry, with any part of the body, or with an instrument held in the hand, is sufficient; as to step over the threshold, to put a hand or a hook in at a window to draw out goods, or a pistol to demand one's money, are all of them burglarious entries. 4 *Bl. Com.* 227.

But where thieves had bored a hole *through* the door with a *centre-bit*, and part of the chips were found in the inside of the house, by which it was apparent that the end of the *centre-bit* had penetrated into the house; yet, as the instrument had not been introduced for the



purpose of taking the property or committing any other felony, the entry was ruled incomplete. 1 *East. Cr. L.* 490-1.

It is universally agreed, that there must be both a breaking, either in fact or by implication, and also an entry, in order to complete the burglary. 4 *Bl. Com.* 227.

In the case of *George Gibbons*, at the Old Bailey, in June 1752; *Gibbons* was indicted for burglary in the dwelling house of *John Allen*. It appeared in evidence, that the prisoner in the night time cut a hole in the window shutter of the prosecutor's shop, which was part of his dwelling house; and putting his hand through the hole, took out watches and other things which hung in the shop within his reach; but no entry was proved, otherwise than by putting his hand through the hole. This was held to be burglary, and the prisoner was convicted. *Fost.* 107-8.

If divers come in the night to do a burglary, and one of them break and enter, the rest of them standing to watch, at a distance, it is burglary in all. 3 *Inst.* 64.

THE MANSION-HOUSE.... This includes also churches, and the walls and gates of a walled town; and all out buildings, as barns, stables, dairy houses, adjoining to a house, are looked upon as part thereof, and consequently burglary may be committed in them. But if they be removed at any distance from the house, it seems that it hath not been usual of late to proceed against offences therein as burglaries. *Haw. B. l. c.* 38. s. 10.

And lord *Hale* says more explicitly, the mansion-house doth not only include the dwelling house, but also the out houses that are parcel thereof, as barn, stable, cow-house, dairy-house, if they are parcel of the messuage, though they are not under the same roof, or joining contiguous to it; and so he says it was agreed by all the judges; but if they be no parcel of the messuage, as if a man take a lease of a dwelling house from one, and of a barn, &c. from another; or if it be far remote from the dwelling house, and not so near to it, as to be reasonably esteemed parcel thereof, as if it stand a bow shot off from the house, and not within or near the curtilage of the chief house; then the breaking is not burglary, for it is not a mansion-house, nor any part thereof. 1 *Hale* 558-9.

Any out-house within the curtilage, or some common fence, as the mansion itself, must be considered as parcel of the mansion. But no distant barn, warehouse, or the like, is under the same privilege; nor indeed any out-house, however near, if it be not parcel of the messuage, and so found to be. 1 *East. Cr. L.* 493.

Thus where the prisoner was indicted for burglary, in the mansion-house; and the jury found specially that the house broken was an out-house, separated from the dwelling-house by an open passage, eight feet wide, but not connected with the dwelling house by any fence inclosing both; the jury not having further found that it was parcel of the dwelling house, it was held not to be burglary. *Ibid.*

But if the out-houses be adjoining to the dwelling house, and occupied as parcel thereof, though there be no common inclosure or curtilage, they may still be considered as parts of the mansion. *Ibid.*

The situation of the buildings, not the title by which they are held, seems to be the essential circumstances. See 1 *East. Cr. L.* 493-4.

To break, and enter a *shop*, not parcel of the mansion-house, in which the shopkeeper never lodges, but only works or trades there in the day time, is not burglary, but only larceny; but if he or his servant usually, or often, lodge in the shop at night, it is then a mansion-house in which burglary may be committed. 1 *Hale* 557-8.

Burglary cannot be committed in a booth or tent, any more than a covered waggon. 4 *Bl. Com.* 226.

Generally speaking, it seems that a mere casual use of a tenement as a lodging, or only on some particular occasions, will not constitute it a dwelling house for this purpose. In *Brown's* case all the judges agreed, that the fact of a servant having slept in a barn the night it was broken open, and for several nights before, being put there for the purpose of *watching against thieves*, made no sort of difference in the question, whether burglary or not. So, a porter lying in a warehouse *to watch goods*, which is only for a particular purpose, does not make it a dwelling house: but if all communication with the dwelling-house, of which it is a part, be not excluded, it may still be a part of the house in which burglary may be committed. 1 *East. Cr. L.* 497.

A house wherein a man dwells but for part of a year, or a chamber in one of the inns of court, or of a college, wherein any person usually lodges, may be called his dwelling house, whether any person were actually therein or not, at the very time of the offence. Yet in all cases the owner must have quitted the house *animo revertendi* (with an intention of returning) in order to have it still considered as his mansion, where neither he nor any part of his family were in it at the time of the breaking and entering. 1 *East. Cr. L.* 496.

Thus, a person possessed of a house in the city of W. wherein he dwelt, took a journey into C. with intent to return, and sent his wife and family out of town, leaving the key with a friend to look after the house: after he had been gone a month, no person being in the house, it was broke open in the night and robbed of divers goods. He returned a month after with his family, and inhabited there. Adjudged burglary. *Ibid.*

*John and Miles Nutbrown* were indicted for burglary in the dwelling house of one Mr. *Fackney*, at *Hackney*, and stealing divers goods. The prosecutor made use of it as a country house in the summer, his chief residence being in London. About the latter end of the summer preceding the offence, he removed with his whole family to his house in the city, and brought away a considerable part of his goods. And in the November following, the house at *Hackney* was broken open, and in part rifled; upon which he removed the remainder of his household furniture, except a clock and a few old bedsteads, and some lumber of little value, leaving no bed or kitchen furniture, or any thing else for the accommodation of a family. Mr. *Fackney* being asked, whether at the time he so disfurnished his house he had any intention of returning to reside there, declared that he had not come to any settled resolution, whether to return or not; but was rather inclined totally to quit the house, and to let it for the remainder of his term. The fact of the burglary happened in the January following. But the court were of opinion, that the prosecutor having left the house, and disfurnished it in the manner before mentioned, without any settled resolution of returning, but rather inclining to the contrary, it could

not be deemed his dwelling house, at the time the fact was committed: and accordingly the prisoners were directed to be acquitted of the burglary; but they were found guilty of felony in stealing the clock, and some other small matters. *Fost.* 75, 77. 1 *East. Cr. L.* 496-7.

It is stated generally by *Hawkins* (B. 1. c. 58, sect. 11.) that burglary may be committed in a house which one has hired to live in, and brought part of his goods into, but has not yet lodged in. But this point has often since been ruled otherwise. See 1 *East. Cr. L.* 497-8.

Thus in the case of *Lyons* and *Miller*, who were indicted for burglary, in the dwelling house of E S; it appeared that the house was left in the care of a carpenter, who was to put it in repair; that the prosecutor had never inhabited it, nor had servants or furniture in it; that the former occupier had removed out of it about a fortnight; and, at the time of the offence committed, it was uninhabited. After conviction, it was held on a reference, to the judges, that this was no mansion-house, never having been inhabited. They also held that it could not be burglary, on *that* indictment, which (charging the intent to steal) must be to steal the goods *then and there being*; and where nothing was in the house, nothing could be stolen. Also it seemed to be the sense of the judges, that although some goods might have been put in the house, yet if neither the party nor any of his family had inhabited it, it would not be a mansion-house, in which burglary could be committed. 1 *East. Cr. L.* 497-8.

So, where the former tenant of a house had quitted it, and the incoming tenant had put in all his furniture, and had been frequently there in the day time; but had never slept in the house, nor any of his family. Held that burglary could not be committed therein. 1 *East. Cr. L.* 498.

(On the authority of *Lyons* and *Miller's* case, above, it was held, that where a house was a new one, and finished all but the painting and glazing; that a workman, who was constantly employed by the owner, slept in it for the purpose of protection; but *no part of the owner's domestic family* had yet taken possession of it; it could not be the mansion-house of the prosecutor. *Ibid.*

So, where the prosecutor had lately taken a house, and on the night of the offence, and for six nights before, had procured two hair-dressers, *none of his own family*, to sleep there, for the purpose of taking care of his goods and merchandise therein deposited; but he himself had never slept there, nor any of his family. Held that the prisoner could not be convicted of burglary. *Ibid.*

On the same principles it was held, that where the owner of a house put a servant into it, to sleep there at nights till he could get a tenant, in order to protect some furniture there which he had purchased of the last tenant, which servant had so slept there for three weeks before; but the owner never intended to inhabit it himself; a conviction for stealing the goods *in the dwelling house* of such owner was wrong, as to the capital part of the charge. 1 *East. Cr. L.* 499.

3. AS TO THE OWNER.—It is necessary to ascertain to whom the mansion belongs, and to state that with accuracy in the indictment. As a general rule, it may be laid down, that where the legal title to the whole mansion remains in the same person, there, if he inhabit

it, either by himself, his family, or servants, or even by his guests, the indictment must lay the offence to be committed against *his* mansion. And so it is, though he let out apartments to inmates, who have a separate interest therein, if they have the same outer door or entrance into the mansion in common with himself. But if distinct families be in the exclusive occupation of the house, and have their ordinary residence or domicile there, without any interference on the part of the proper owner, or if they be only in possession of parts of the house as inmates to the owner, and have a distinct and separate entrance; then the offence of breaking, &c. their separate apartments must be laid to be done against the mansion-house of such occupiers respectively. 1 *East. Cr. L.* 499, 500. See cases illustrating the above rule, 1 *East. Cr. L.* from p. 500 to 508.

The house of a corporation, inhabited in separate apartments by the officers of the body corporate, is the mansion-house of the corporation, and not of the respective officers. 4 *Bl. Com.* 225.

There may be such a severance by lease of part of a mansion, as that it shall no longer be the subject of burglary. As if a person hire a shop, parcel of another man's house, to work or trade in, but never lie there, it is no dwelling house, nor can burglary be committed therein; it is not the mansion of him who occupies the other part, nor is it the dwelling house of the lessee, who never lies there. 4 *Bl. Com.* 225. 1 *East. Cr. L.* 507.

IN THE NIGHT....The time must be by night, and not by day; for in the day time there is no burglary. 4 *Bl. Com.* 224.

But the breaking and entry need not both be in the same night; for if thieves break a hole in the house one night, to the intent to enter another night, and commit felony, and they accordingly do so through the hole they so made the night before, this seems to be burglary; for the breaking and entry were both in the night. 1 *East. Cr. L.* 508. 4 *Bl. Com.* 226.

As to what shall be accounted night, lord Coke says, as long as the day continues, whereby a man's countenance may be discerned, it is called day; and when darkness comes and day light is past, so as by the light of day you cannot discern the countenance of a man, then it is called night. And this doth aggravate the offence; since the night is the time when man is at rest, and when beasts run about seeking their prey. Hence in ancient records, the twilight was signified, when it was said, *inter canem et lupum* (between the dog and the wolf); for when the night begins the dog sleeps, and the wolf seeketh his prey. 3 *Inst.* 63.

Anciently the day was accounted to begin only at sun-rising, and to end immediately upon sun-set; but the better opinion seems to be, that if there be day-light, or *crepusculum* enough, begun or left, to discern a man's face withal, it is no burglary. 4 *Bl. Com.* 224: 1 *East. Cr. L.* 509.

But this does not extend to moon light; for then many midnight burglaries would go unpunished: and besides, the malignity of the offence does not so properly arise from its being done in the dark, as at the dead of night; when all creation, except beasts of prey, are at rest; when sleep has disarmed the owner, and rendered his castle defenceless. 4 *Bl. Com.* 224.

An indictment was held insufficient for burglary, which stated the fact to have been committed in the night, without expressing the particular hour, and the prisoner was found guilty of simple felony only. *K. and Waddington*, at the Lancaster lent assizes. 1771.

ITH INTENT TO COMMIT A FELONY, WHETHER, &c... It is clear that such breaking and entry must be with a felonious intent, otherwise it is only a trespass. 4 *Bl. Com.* 227

And it is the same whether such intention be actually carried into execution, or only demonstrated by some attempt or overt act, of which the jury is to judge. *Ibid.*

And therefore such a breach and entry of a house as has been before described, by night, with intent to commit a robbery, a murder, a rape, or any other felony, is burglary; whether the thing be actually perpetrated or not. *Ibid.*

Nor does it make any difference, whether the offence were felony at common law, or only created so by statute: since that statute, which makes an offence felony, gives it incidentally all the properties of a felony at common law. *Ibid.*

here a man commits burglary, and at the same time steals goods out of the house, it is also larceny; and if he be acquitted of the burglary, he may notwithstanding be indicted of the larceny; for they are several offences, though committed at the same time. And burglary may be where there is no larceny, and larceny may be where there is no burglary. 2 *Hale* 246.

## II. HOW IT IS PUNISHED.

Formerly the benefit of clergy was taken away both from the principals and accessories before the fact in burglary. (1 *Rev. Code*, p. 45, 46.) By the penitentiary law of 1796, which went into operation on the twenty fifth of March, 1800, every person convicted of robbery or burglary, or as accessory thereto before the fact, shall restore the thing robbed or taken to the owner, or pay the full value thereof, and be sentenced to confinement in the penitentiary, for a period not less than three, nor more than ten years. (See 1 *Rev. Code*, p. 356, sect. 5.) But, by act of 1803, which commenced the first of April, 1804, the punishment of burglary is made not less than five nor more than ten years. See 2 *Rev. Code*, p. 70.

☞ The penitentiary law extends to free persons only.

### (A) Warrant to apprehend a burglar.

County, to wit:

To the constable of

Whereas A J, of the county of                    aforesaid, merchant, hath this day made information and complaint upon oath before me. J P, one of the commonwealth's justices of the peace for the said county, that on the                    day of                    in the night, the dwelling house of him the said A J, at the county aforesaid, was feloniously and burglariously broken open, and one gold watch, of the value of one hundred d. lars, of the goods and chattels of him the said A J, feloniously and burglariously stolen, taken and carried away from thence, and

that he hath just cause to suspect, and doth suspect, that A O, of  
in the county of                      labourer, the said felony and bur-  
glary did commit. These are therefore, in the name of the common-  
wealth, to command and require you, that immediately upon sight  
hereof you do apprehend the said A O, and bring him before me, or  
some other justice of the peace for this county, to answer the pre-  
mises, and to be further dealt with according to law. Herein fail not.  
Given under my hand and seal, &c.

If the person charged upon oath with the burglary is not well and  
certainly known, it is usual in the warrant to insert a clause directing  
pursuit by hue and cry: this may come in after the words, "to com-  
mand and require you," thus; and each of you to search diligently  
for the said A O, within your several precincts, and likewise to make  
hue and cry after him, from town to town, and from county to county,  
as well by horsemen as footmen; and if you shall find the said A O,  
that then you apprehend him, and carry him before some justice of  
the peace for the county where he shall be taken, and there deliver  
him, together with this warrant. The said A O is a person (*here  
describe his stature, age, apparel, &c. particularly.*)

The justice before whom the suspected party is brought, may  
summon witnesses to give evidence against him, if he finds it neces-  
sary.

(B) *Summons for a witness.*

To A C, or any other constable of                      county.  
County, to wit:

You are hereby commanded, in the name of the commonwealth,  
to summon A W to come before me, at                      in this county, to-  
morrow, by                      o'clock in the forenoon, to testify and the truth  
to say, concerning a certain burglary and felony, suspected to be done  
by A O, of &c. and that you then and there attend with this war-  
rant, to shew how you have executed the same. Given under my  
hand, &c.

If upon the examination of the felon and the witnesses, it should  
appear proper to the justice to call a court for the further examination  
of the criminal, he should take the recognizance of the witnesses to  
appear at such court, and commit the offender to jail.

For the form of the recognizance and warrant to summon a court,  
see title "CRIMINALS."

(C) *Mittimus.*

To the sheriff of                      county, or to the keeper of the jail of the  
said county.

County, to wit:

These are to command and require you, in the name of the com-  
monwealth, to receive into your jail the body of A O, late of the  
county of                      labourer, taken and brought before me, for felony  
and burglary by him committed, in breaking and entering the dwell-  
ing house (*or if any other house, describe the kind particularly*) of A J,  
of the county of                      merchant, on the                      day of  
in the night time, at                      o'clock of the said night, and feloniously

taking and carrying away from thence *one gold watch*, of the value of *one hundred dollars*, of the goods and chattels of him the said A J, in the said dwelling house then and there being, wherewith the said A O stands charged before me (or, *and the said A O having before me confessed the same*) you are hereby commanded to keep the said A O safely in your jail and custody, without bail or mainprize, until he shall thence be discharged by due course of law. Given under my hand and seal, &c.

*(D) Indictment for proper burglary.*

County, to wit :

The jurors for the commonwealth, upon their oath do present, that A O, late of the county of                   aforesaid, labourer, on the day of                   in the year                   at the hour of one, in the night of the same day, with force and arms, at the county aforesaid, the dwelling house of A J, feloniously and burglariously did break and enter, with intent him the said A J, of his goods in the same dwelling house then being, feloniously and burglariously to spoil and rob, and the same goods feloniously and burglariously to steal, take and carry away, against the peace and dignity of the commonwealth.

As it is difficult to establish an intention to commit a felony without proof of some actual felonious deed, the foregoing precedent is seldom used. The following one will be found more generally useful.

*(E) Indictment for burglary and larceny.*

County, to wit :

The jurors for the commonwealth, upon their oath do present, that A O, late of the county of                   aforesaid, labourer, on the day of                   in the year                   between the hours of *ten* and *eleven* in the night of the same day, with force and arms, at the county aforesaid, the dwelling house of A J, feloniously and burglariously did break and enter, and *one gold watch*, of the value of *one hundred dollars*, in the same dwelling house then and there feloniously and burglariously did steal, take and carry away, against the peace and dignity of the commonwealth.

## BURNING.

*I. Of burning houses, considered as offences against the laws of this commonwealth. II. Of arson, or burning, at the common law.*

### I. OF BURNING HOUSES, CONSIDERED AS OFFENCES AGAINST THE LAWS OF THIS COMMONWEALTH.

1. "EVERY person, that shall at any time, either in the night or the day, maliciously, unlawfully and willingly, burn any house or houses whatsoever, or shall comfort, aid, abet, assist, counsel, hire, or command, any person or persons to commit any of the said offences, being thereof convicted or attainted," &c. shall suffer death without benefit of clergy. 1 *Rev. Code*, p. 206.

2. By the penitentiary law (1 *Rev. Code*, p. 356, sect. 4.) *arson*, at *common law*, is particularly enumerated. It would seem, therefore, that if the offence be not *arson at common law* (or houses burning in a town, see the next paragraph) the punishment must be regulated by the act of 1799 (1 *Rev. Code*, p. 402.) which fixes the period of confinement, in cases not clergyable by the laws in force when the penitentiary system went into operation, and which are not provided for by the original law of 1796, at not less than *one* nor more than *ten* years.

3. But by act of 1804 (2 *Rev. Code*, p. 80, sect. 7.) "every person who shall at any time, either in the night or the day, maliciously, unlawfully and willingly, burn or set fire to any house or houses whatsoever, *in a town*, or shall aid, abet, assist, counsel, hire or command, any person or persons to commit any of the said offences, being thereof lawfully convicted, and either of the said offences shall actually have been committed, shall be deemed guilty of felony, and shall suffer death as a felon."


4. By the same law (2 *Rev. Code*, p. 80, 81, sect. 9.) "every person who shall at any time, either in the night or the day, maliciously, unlawfully and willingly, burn or set fire to any barn, stable, corn-house, tobacco-house, stack of wheat, barley, oats, corn, or other grain, or any stack of fodder, straw or hay; or shall aid, abet, assist, counsel, hire or command, any person or persons to commit any of the said offences, being thereof lawfully convicted, and either of the said offences shall actually have been committed, shall be deemed



guilty of a misdemeanor, and shall be sentenced to undergo a confinement in the penitentiary, for any time not less than *two* nor more than *five* years; and shall moreover pay the full value of the property burnt or destroyed to the owner," &c.

5. By act of 1808 (2 *Rev. Code*, p. 166.) "if any slave or slaves, at any time hereafter, shall wilfully and maliciously burn or set fire to any barn, stable, corn-house, or other house, or shall advise, counsel, aid, abet or assist, any slave or slaves, free negro or mulatto, to commit either of the said offences, being thereof lawfully convicted, if the amount of the burning be of the value of ten dollars, he, she or they, shall be deemed guilty of felony; and shall suffer *death*, as is provided in other cases of felony.

6. *Sect. 2, of the above law.* "If any slave or slaves shall wilfully and maliciously burn or set fire to any stack or cock of wheat, barley, oats, corn, or other grain, or to any stack or cock of hay, straw or fodder, or shall advise, counsel, aid, abet or assist, any slave or slaves, free negro or mulatto, to commit either of the offences in this section mentioned, being thereof lawfully convicted, he, she or they, shall be deemed guilty of felony, and shall be burnt in the hand, and receive on their back any number of lashes not exceeding thirty-nine, as the court in their discretion may think fit to inflict." 2 *Rev. Code*, p. 166-7.

7. "The wilful burning of any court-house, or county or public prison, or the office of the clerk of any court within this commonwealth," was declared to be felony without benefit of clergy, in the principals and accessories before the fact. (See 1 *Rev. Code*, p. 45, 46.) But see *ante*. No. 2. 

## II. OF ARSON, OR BURNING, AT THE COMMON LAW.

1. Arson (from *ardendo*) is the malicious and wilful burning of the house or out-house of another man. 4 *Bl Com.* 230.

And this was felony, by the common law, whether the offence be committed in the night or the day. *Haw. B. l. c.* 39.

MALICIOUS AND WILFUL.....For if it be done by mischance or negligence, it is no felony 3 *Inst.* 67.

Yet if a man, maliciously intending only to burn one person's house, happens thereby to burn the house of another, it is certain that he may be indicted as having maliciously burned the house of that other; for where a felonious design against one man missetteth its aim, and takes effect upon another, it shall have the like construction, as if it had been levelled against him who suffers by it. *Haw. B. l. c.* 39, sect. 5.

BURNING.....Neither a bare intention to burn a house, nor even an actual attempt to do it by putting fire to a part of a house, will amount to felony, if no part of it be burned; but if any part of the house be burnt, the offender is guilty of felony. notwithstanding the fire afterwards be put out, or go out of itself. *Ibid.* sect. 4. 4 *Bl. Com.* 222.

THE HOUSE.....Not only a mansion-house, and the principal parts thereof, but also any other house, and the out buildings, as barns and stables adjoining thereto; and also barns full of corn, whether they be adjoining to any house or not, are so far secured by law, that the

malicious burning of them is felony at common law. *Haw. B. 1. c. 39. sect. 1. 4 Bl. Com. 221.*

OF ANOTHER... The offence of *arson* (strictly so called) may be committed by wilfully setting fire to one's own house, provided one's neighbour's house is thereby also burnt; but if no mischief is done but to one's own, it does not amount to felony, though the fire was kindled with intent to burn another's. *4 Bl. Com. 221.*

If a landlord or reversioner sets fire to his own house, of which another is in possession under a lease from himself, or from those whose estate he hath, it shall be accounted *arson*, for during the lease the house is the property of the tenant. *Ibid.*

And it has been expressly determined, that if a tenant set fire to the house of his landlord, before the tenancy expires, he is not guilty of *arson*. *4 Bl. Com. 222. Christian's note (2.)*

2. The punishment of *arson* was formerly death. (See *4 Bl. Com. 222. 1 Rev. Code, p. 45.*) By the penitentiary law of 1796 (*1 Rev. Code, p. 356, sect. 4.*) it was made punishable by confinement in the penitentiary, for a period not less than five nor more than twelve years; by act of 1803 (*2 Rev. Code, p. 70, sect. 1.*) the term of confinement was extended to not less than ten nor more than twenty-one years; but by act of 1804 (*2 Rev. Code, p. 80, sect. 8.*) *arson* is punishable with death.

### (A) Warrant for burning a house.

To constable of the county of  
County, to wit:

Whereas A J, of the county of aforesaid, merchant, hath this day made complaint, upon oath, to me J P, one of the commonwealth's justices of the peace for the county aforesaid, that on the day of a house, viz. (*describe the kind*) belonging to him the said A J, and in his possession, was wilfully and maliciously set on fire, and burnt, and that he hath just cause to suspect, and doth suspect that A O, of the county aforesaid, labourer, did feloniously, voluntarily and maliciously, burn the said house These are therefore, in the name of the commonwealth, to require you immediately to apprehend the said A O, and to bring him before me, or some other justice of the peace for the said county, to be examined concerning the premises, wherewith he is suspected. Given under my hand and seal, &c.

For other precedents, see title "CRIMINALS."

### (B) Indictment for wilfully burning a house.

County, to wit:

The jurors for the commonwealth, upon their oath, do present, that A O, late of the county of aforesaid, labourer, not having the fear of God before his eyes, but being moved and seduced by the instigation of the devil, on the day of in the year about the hour of in the night of the same day, with force and arms, at the county aforesaid, a certain house,\* called

\* Sufficient without saying *dwelling house*. *Haw. B. 1, c. 39. sect. 1.*

(describe the kind) of one A J, there situate, feloniously, voluntarily and maliciously, did set fire to, and the same house then and there, by such firing as aforesaid, feloniously, voluntarily and maliciously, did burn and consume, against the form of the statute in such case made and provided, and against the peace and dignity of the commonwealth.

## BUYING OF TITLES.

### I. BY THE COMMON LAW.

It is a high offence at common law, to buy or sell any doubtful title to lands known to be disputed, to the intent that the buyer may carry on the suit, which the seller doth not think it worth his while to do, and on that consideration sells his pretensions at an under rate; and it seems not to be material, whether the title so sold be a good or bad one, or whether the seller were in possession or not, unless his possession were lawful and uncontested, for all practices of this kind are by all means to be discountenanced, as manifestly tending to oppression, by giving opportunities to great men to purchase the disputed titles of others, to the great grievance of the adverse parties, who may often be unable or discouraged to defend their titles against such powerful persons, which perhaps they might safely enough maintain against their proper adversary. *Haw. B. 1. c. 86. sect. 1.*

### II. BY STATUTE.

"No person shall convey or take, or bargain to convey or take, any pretended title to any lands or tenements, unless the person conveying, or bargaining to convey, or those under whom he claims, shall have been in possession of the same, or of the reversion or remainder thereof, one whole year next before; and he who offendeth herein, knowingly, shall forfeit the whole value of the lands or tenements; the one moiety to the commonwealth, and the other to him who will sue as well for himself as for the commonwealth: but any person lawfully possessed of lands or tenements, or of the reversion or remainder thereof, may nevertheless take, or bargain to take, the pretended title of any other person, so far, and so far only, as it may confirm his former estate." 1 *Rev. Code*, p. 37.

See a declaration for buying a pretended title, *Plowden* 78, 80. *Partridge v. Strange and Crocker.*

## CARRIERS.

The term *Carrier* is seldom used in common conversation ; but in its legal acceptation, it comprehends masters and owners of ships, hoymen, lightermen, barge owners, proprietors of waggons, stage-coaches, &c. who, by the custom of the country, that is, by the common law, are bound to receive and carry goods for a reasonable hire or reward ; to take due care of them in their passage ; to deliver them safely, and in the same condition as when received ; or, in default thereof, to make compensation to the owner for any loss or damage which happens while the goods are in their custody ; except such loss or damage as arises from the act of God, as storms, tempests, or the like, or of the enemies of the commonwealth. (*Schw. N. P.* 323.) To which exception may be added such losses as arise from the default of the party sending the goods. 2 *Esp. N. P.* 619.

A carrier shall not evade the law, by refusing to carry goods at the prices limited. For if a common carrier, who is offered his hire, and who hath convenience, refuses to carry goods, he is liable to an action, in the same manner as an innkeeper who refuses to entertain a guest, or a smith who refuses to shoe a horse. 2 *Show.* 327.

So an action will lie against a common ferryman, who refuseth to carry passengers. 1 *Bac. Abr.* 344.

But if the porter puts up the box of a passenger behind a stage coach, and the master as soon as he knows of it says, he is already full, and refuses to take the charge of it, the master shall not be liable. For this is the same with an host who refuseth his guest, his house being full, and yet the party says he will shift, or the like, if he be robbed, the host is discharged. *Ibid.*

So a carrier may refuse to admit goods into his warehouse at an unseasonable time, or before he is ready to take his journey ; but he cannot refuse to do the duty incumbent upon him by virtue of his public employment. *L. Raym.* 652.

If goods be sent by a carrier, and he embezzle them, it is not larceny. 4 *Bl. Com.* 230. *Haw. B. 1. c.* 33. *s.* 4.

But if the carrier opens a bale or pack of goods, or pierces a vessel of wine, and takes away part thereof, or if he carries it to the place appointed, and afterwards takes away the whole, these are larcenies : for here the *animus furandi* is manifest ; since in the first case he had otherwise no inducement to open the goods, and in the second the trust was determined, the delivery having taken its effect. 4 *Bl. Com.* 230.

It has been decided, that if a parcel be left by accident in a hackney coach, and the coachman, instead of restoring it to the owner, opens

it, and embezzles part of its contents, he is guilty of larceny. *Ibid.*  
*Christian's note.*

Also, if goods be delivered to a carrier, to be carried to a certain place, and he carries them to another place, and there opens and disposes of them, it is felony. *Kely. 82.*

Where goods are delivered to a carrier, and he is robbed of them, he shall be charged, and answer for them, by reason of the hire : and this was at the common law, before the hundred was answerable for him ; because such robbery might be, by consent and combination, carried on in such a manner, that no proof could be had of it. *1 Salk. 143. 1 Inst. 89, a.*

And although it may be thought a hard case, that a poor carrier who is robbed on the road, without any manner of default in him, should be answerable for all the goods he takes ; yet the inconvenience would be far more intolerable, if he were not so ; for it would be in his power to combine with robbers, or to pretend a robbery, or some other accident, without a possibility of remedy to the party ; and the law will not expose him to so great a temptation, but he must be honest at his peril. *12 Mod. 482.*

And generally, if a man delivers goods to a common carrier, to carry to a certain place : if he loses or damages them, an action upon the case lies against him ; for, by the custom of the country, he ought to carry them safely. (*1 Bac. Abr. 343.*) And if he be a common carrier, though there be no agreement, or rate settled, or promise of payment ; yet he shall recover his hire on a *quantum meruit*, and therefore shall be liable for loss and damages. *1 Bac. Abr. 343.*

Also, if a person, who is no common carrier, takes upon himself to carry my goods safely and securely, though I promise him no reward, yet, if my goods are lost or damaged by his default, I shall have an action against him. *Lord Raym. 909.*

For the very taking of the goods is a general consideration, though he be not a common carrier : and the acceptance of the goods makes him liable. *Show. 104.*

On an action against a common carrier, the question was, in whose name the action ought to have been brought. The declaration charged, that the plaintiff, being possessed of cloth, as of his own proper goods, delivered the same to the defendant to be carried to London, and delivered to a certain person there. The goods were lost, and the plaintiff obtained a verdict against the carrier. It was moved for a new trial, on the objection that the action ought to have been brought in the name of the person to whom the goods were consigned, and not in the name of the consignor. For the consignor parted with his property upon his delivering the goods to the carrier, and no property remained in him after the delivery. Upon this it was answered, that the question doth not turn upon the strict property. The carrier has nothing to do with the vesting of the property. It does not lie in his mouth to say, that the consignor is not the owner. He is the owner with respect to the carrier, who undertook to him, and was to be paid by him. *Lord Mansfield* said there was neither law nor conscience in the objection. The vesting of the property may differ according to the circumstances of cases : But it does not enter into the present question. This is an action upon the agreement

between the plaintiff and the carrier. The plaintiff was to pay him. Therefore the action is properly brought by the plaintiff, who agreed with him, and was to pay him. *Bur. Mansf.* 2680. See also, 1 *Term. Rep.* 659.

But it has since been decided, that the action against carriers must be brought by the owner of the goods. Hence, where a tradesman orders goods to be sent by a carrier, at the moment the goods are delivered to the carrier it operates as a delivery to the purchaser, and the whole property (subject only to the right of stoppage in transitu by the seller) vests in the purchaser, he alone can maintain an action against the carrier for any loss or damage to the goods; and this rule holds as well where the particular carrier is not named by the purchaser, as where he is. And the ground of the decisions in 5 *Bur.* 2680, and 1 *T. Rep.* 659, is said to be, that the consignor had made himself responsible to the carrier for the price of the carriage. See *Selw. N. P.* 339. 8 *T. Rep.* 330. 3 *Bos. and Pull.* 584. 1 *Atk.* 248.

A delivery to the carrier's servant, is a delivery to the carrier; and if goods are delivered to a carrier's porter, and lost, an action will lie against the carrier. 1 *Salk.* 282.


In the case of *Harvey* against *Syllard* and his wife; the plaintiff brought his action against *Syllard* and his wife, for a box with 80l. in it, which was delivered to her as book-keeper for her brother, who was a carrier, in order to be sent by the waggoner to London; which 80l. was afterwards lost: It was adjudged that the action would not lie against her, but it ought to have been brought against the brother himself, and the plaintiff was nonsuited. 2 *Barnard.* 234.

If a box is delivered generally to a carrier, and he accepts it, he is answerable, though the party did not tell him there is money in it. But if the carrier asks, and the other says no, or if he accepts it conditionally, provided there is no money in it, in either of these cases the carrier is not liable. *Stra.* 145.

If a man delivers a box to a carrier to carry, and he asks what is in it, and the man tells him, a book and tobacco (as the case was) and in truth there is 100l. besides; yet if the carrier is robbed, he shall answer for the money; for the other was not bound to tell him all the particulars of the box, and it was the business of the carrier to have made a special acceptance. 1 *Bac. Abr.* 345.

But if a person, being a common carrier, receives by his book-keeper from another man's servant, two bags of money sealed up, containing, as was told him, 200l. and the book-keeper gives a receipt for his master to this effect—received of such a one two bags of money sealed up, said to contain 200l. which I promise to deliver on such a day, at such a place, unto such a person, he to pay 10s. *per cent.* for carriage and risque; though the bags contain 400l. and the carrier is robbed, he shall be answerable only for 200l. for this is a particular undertaking; and as it is by reason of the reward that the carrier is liable, when the plaintiff endeavours to defraud him of it, it is but reasonable he should be barred of the remedy, which is only founded on the reward. 1 *Bac. Abr.* 346. 1 *Rep. N. T.* 621.

A man took a place in a stage-coach, and in the journey the defendant, by negligence, lost the plaintiff's trunk: upon not guilty pleaded, the evidence was, that the plaintiff gave the trunk to the man that

drove the coach, who promised to take care of it, but lost it: *Holt* chief justice held, that the master was not chargeable, and that a stage coachman is not within the custom, as a carrier is, unless the master make a distinct price for the carriage of the goods as well as of the persons. 1 *Salk.* 282.  But see 4 *Esp. Rep.* 177. 6 *East.* 564. 2 *Bos. and Pull.* 419. *Schw. N. P.* 323. 1 *Esp. Rep.* 37. (*Day's edition*) note (1) where the above doctrine is overruled.

By the custom and usage of stage coaches, every passenger uses to pay for the carriage of goods above such a weight; and in such case the coachman shall be charged, for the loss of goods beyond such weight. 1 *Conn. Rep.* 25. See the limitation in the cases above cited.

An action was brought against the *Birmingham* stage coachman, for 100*l.* in money, sent from *Birmingham* to *London* by his coach, and lost. It was hid in hay, in an old nail-bag. The bag and the hay arrived safe; but the money was gone. The coachman had inserted an advertisement in a *Birmingham* newspaper, with a *nota bene*, that the coachman would not be answerable for money or jewels, or other valuable goods, unless he had notice that it was money or jewels, or other valuable goods, that was delivered to him to be carried. He had also distributed hand bills of the same import.

It was notorious in that country, that the price of carrying money from *Birmingham* to *London* was three pence in the pound. The plaintiff was a dealer at *Birmingham*; and frequently sent goods from thence. It was proved that he had been used, for a year and a half, to read the newspaper in which this advertisement was published; though it could not be proved that he had ever actually read or seen the individual paper within which it was inserted. A letter of the plaintiff's was also produced, from whence it appeared that he knew the course of this trade, and that money was not carried from that place to *London* at the common and ordinary price of the carriage of other goods. And the jury found a verdict for the defendant. On behalf of the plaintiff it was moved for a new trial; and a rule was obtained to shew cause. On shewing cause, the court were of opinion that the verdict was right. By the general custom of the realm, a common carrier insures the goods at all events. And it is right and reasonable that he should do so. But he may make a special contract; or he may refuse to contract, in extraordinary cases, but upon extraordinary terms. And certainly the party undertaking ought to be apprised what it is that he undertakes; and then he will, or at least may, take proper care. But he ought not to be answerable where he is deceived. Here he was deceived. The money was hid in an old nail-bag; and it was concealed from him that it was money. The true principle of a carrier's being answerable is the reward. And a higher price ought in conscience to be paid him for the insurance of money and other valuable things, than for insuring common goods of small value. And the rule was discharged. 4 *Burr.* 2298. *Gibbott v. Paynton*.

Where goods are stolen from the carrier, he may prefer an indictment against the felon, as for his own goods; for though he has not the absolute property, yet he has such a possessory property, that he may maintain an action of trespass against any one who takes them from him, and so may indict a thief for taking them; and the indict-

ment were good also, if it had been brought by the real owner. *Kellynge* 39.

And there is a special case, wherein it is said, that a man may commit larceny by stealing his own goods delivered to the carrier, with an intent to make him answer for them; for the carrier had a special kind of property in the goods, in respect thereof, if a stranger had stolen them, he might have been indicted generally as having stolen the said carrier's goods, and the injury is altogether as great, and the fraud as base, where they are taken away by the very owner. *Haw. B. l. c. 33. s. 30.*

In an action of *trover* against a common carrier, for goods delivered to him to carry; on not guilty pleaded, the defendant gave in evidence, that he offered to deliver the goods to the plaintiff, if he would pay him his hire; but that the plaintiff refused, and therefore he retained them. And it was ruled by *Holt* chief justice, that a carrier may retain the goods for his hire. And by his direction a verdict was given for the defendant. *L. Kaym. 752.*

And even if the goods be stolen goods, yet the right owner shall not have them without paying for the carriage. For the carrier being obliged to receive and carry the goods, the law will not deprive him of the remedy for the reward due for the carriage. *Ibid. 166.* See, as to the lien of carriers, *Selw. N. P. 337.*

By the general custom of the country, the common carrier insures the goods at all events; but he may make a special contract, in extraordinary cases, on extraordinary terms. 4 *Burr. 2302.* 1 *Term. Rep. 33.* And so he may limit his liability by general or special notices; as by publishing in a newspaper, or in hand-bills, or by placing in conspicuous places in the office, that he will not be liable, unless the property conveyed be entered and paid for, in proportion to the risk, &c. See *Selw. N. P. 328, 334, and the cases there cited.* See also, 1 *Esp. Rep. (Day's edition) 57, note.*

A ship-master, who undertakes to carry goods safe, must deliver them so, unless damaged by the act of God, or the enemies of the commonwealth; and in an action, the plaintiff need only prove their good order when delivered on board, and their being damaged when delivered out; evidence will not be allowed to shew that the defendant was careful; as that the ship was tight when the goods were put on board, but that the rats had knawed out the oakum. 1 *Wils. 281.*

But the master of a hoy shall not be chargeable for goods lost or damaged by tempest. *Str. 128.*

A carrier, who undertakes for hire to carry goods, is bound to deliver them at all events, except damaged or destroyed by the act of God, or the commonwealth's enemies, even though the jury expressly find, that the goods were destroyed, *without any actual negligence in the carrier*, as where the loss was occasioned by accidental fire. 1 *Term. Rep. 27.* 5 *T. Rep. 389.*

And an action lies against the executor or administrator of a carrier; for it is founded upon the contract. 5 *Mod. 92.*

For the plaintiff may declare either in *assumpsit* or *tort*; but the modern practice is to declare in *assumpsit*. See a great variety of precedents in HENING'S LAWYER'S GUIDE, under heads of "ASSUMPSIT," and "TORTS" of various kinds. See also, *Selw. N. P. 339. 343, the advantages and disadvantages of each species of action.*



## CATTLE.

THE regulations prescribed by law for driving cattle through this state may be found in the first volume of the *Revised Code* (printed in 1803) page 274, sect. 6, 7, 8, which book being in the hands of every magistrate, it will be unnecessary to insert the law in this place: The following forms, it is presumed, will suffice.

*(A) Warrant to two freeholders to view the cattle previously to granting a bill of health.*

county, to wit.

To A F and B F, two freeholders of the said county.

Whereas A D hath this day, according to act of Assembly, made application to me J P, one of the commonwealth's justices of the peace for the county aforesaid, for the purpose of obtaining a bill of health for head of nett cattle, driven by him into this commonwealth, from the state of North Carolina, and now at in this county; a description of which cattle is hereto annexed: These are therefore, in the name of the commonwealth, to require you, immediately upon the receipt hereof, to repair to the said and to examine into the health and condition of the said cattle, and forthwith make report thereof to me, or some other justice of the peace for this county. Herein fail not. Given under my hand this day of J. P.  
in the year

I have thought it most proper to draw the warrant, annexing to it a description of the cattle, because the magistrate is required to sign the bill of health, describing the cattle particularly, but not until two freeholders have reported them to be sound, which is all they are required to do.

*(B) Description of head of cattle brought into this state from North Carolina, by A. D. and referred to in the foregoing warrant.*

Bulls marked, &c. Steers marked, &c. Cows marked, &c. Heifers marked, &c.

*(C) Report of the freeholders.*

county, to wit.

Pursuant to a warrant to us directed by J P, a justice of the peace for the said county, we have this day examined into the

health and condition of        head of cattle, shewn to us by A D, and answering to the description annexed to the said warrant, and do find them to be free from all kinds of contagious distempers. Given under our hands, &c.

A. F.

B. F.

(D) *Bill of health.*

county, to wit.

I, J P, a justice of the peace for the said county, do hereby certify, that the health and condition of        head of cattle, driven by A D from the state of North Carolina, a description of which said cattle is hereto annexed, have, in obedience to my warrant, and according to law, been examined into by two freeholders of this county; and the said freeholders have reported to me that the said cattle are free from all kinds of contagious distempers. Given under my hand and seal, &c.

J. P.

(E) *Warrant against a freeholder refusing to act.*

To        constable.  
county, to wit.

Whereas complaint, &c. by A D, a driver of cattle through this county, that A F, a freeholder of the said county, to whom my warrant hath been directed, for the purpose of examining into the health of the said cattle, doth altogether refuse to obey the said warrant, contrary to the act of Assembly in that case made and provided: These are therefore, &c.

Penalty for not acting, any sum not exceeding five dollars.

(F) *Warrant for slaughtering the cattle, where they are reported distempered, and the driver refuses to impound them, or suffers them to escape, before a justice certifies that they may be removed with safety.*

county, to wit.

Whereas it appears to me, J P, one of the commonwealth's justices of the peace for the county aforesaid, from the report of A F, and B F, two freeholders of the said county, to whom my warrant was directed, for the purpose of examining into the health and condition of        head of cattle, driven into this county from the state of North Carolina, by A D (a description of which cattle is hereto annexed) that the said cattle are infected with a contagious distemper; and that the said A D refuses to impound the said cattle (or hath suffered them to escape, without having first obtained a certificate from

some justice of the peace for this county, that they may be removed without annoying others, *as the case may be.*) These are therefore, in the name of the commonwealth, to require you immediately to kill all the cattle in the said drove, and to bury the carcasses, with the hides on, at least four feet deep, but so cut or mangled, that none may be tempted to take them up and flay them. Herein fail not. Given under my hand and seal this                      day of                      in the year

To A B, B B, C B, &c. to execute.

Fee, eighty-three cents each head of cattle, to be paid by the county.

*(G) Warrant against a person refusing to execute the foregoing warrant.*

To                      constable.  
county, to wit :

Whereas complaint, &c. that A B, one of the persons to whom my warrant was directed, for the purpose of slaughtering                      head of cattle, driven into this county by A D, from the state of North Carolina (which were reported to me to be infected with a contagious distemper, by A F and B F, two freeholders, appointed by me to view the said cattle) hath altogether refused to execute the said warrant. These are therefore to require you, &c. to summon, &c.

*(H) Licence of a magistrate to remove cattle impounded, in consequence of their having been distempered.*

county, to wit :

Whereas                      head of cattle, driven into this county by A D, from the state of North Carolina, have been impounded by the said A D, from the                      day of                      last past, in consequence of a report having been made to me by A F and B F, two freeholders of this county, appointed to view the said cattle, that the said cattle were infected with a contagious distemper; and it appearing to me, from satisfactory information, that the said cattle may now be removed without annoying others. These are therefore to authorise the said A D to proceed on his journey with the said cattle, subject only to such regulations as may be further imposed by law. Given under my hand and seal, &c.

*(I) Certificate of a magistrate, to be made on the back of the driver's manifest.*

county, to wit :

I, J P, a justice of the peace for the county aforesaid, in the commonwealth of Virginia, do hereby certify that A D, of the county of

in the state of North Carolina, did this day produce to me bills of sale for the within mentioned cattle according to law; and did moreover take an oath before me, that he knew of no more cattle in his drove, than those contained in the within manifest and bills of sale. Given under my hand and seal, &c.

*(J) Warrant against a driver for failing to produce a manifest.*

To the sheriff, or any constable of the county of \_\_\_\_\_ county, to wit:

Whereas complaint hath this day been made before me, J P, one of the commonwealth's justices of the peace for the said county, by A J, that A D hath brought into this county, from the state of North Carolina, a drove of nett cattle, and hath failed to produce to the next justice of the county in this state a manifest, and bills of sale for the said cattle, and to take the oath prescribed by law. These are therefore, in the name of the commonwealth, to authorise and require you to raise sufficient force within the said county to seize and detain the said drove of cattle. And I do further hereby require you to bring the said A D before me, or some other justice of the peace for this county, to answer the premises. Herein fail not at your peril; and make return how you have executed this warrant. Given under my hand and seal, &c.

If the cattle are brought into any county in this state, to be carried into any other state; for neglect to produce a manifest, &c. say: hath brought \_\_\_\_\_ head of nett cattle into this commonwealth, in order to be driven into the state of Maryland, and hath failed to produce to the next justice of the county wherein they were brought, &c.

*(K) Judgment.*

On hearing the matter of the within complaint, it is adjudged that the drove of cattle within mentioned, amounting to \_\_\_\_\_ head, are forfeited; therefore the sheriff is directed to sell the same, in like manner as goods taken in execution, and to return an account of the sales, as also the expence of maintaining the said cattle from the time of their seizure till such sale, to me, or some other justice of the peace for this county, that the same may be adjusted, and the money arising therefrom applied according to the directions of the act of the General Assembly in that case made and provided. Given under my hand, &c.

*(L) Justice's order on return of the sales.*

The sheriff having returned an account of sales amounting to \_\_\_\_\_ dollars, and claiming \_\_\_\_\_ dollars, as his commission thereon, also \_\_\_\_\_ dollars, as an allowance for keeping the said cattle from the day of the seizure to the day of sale, at the rate of three

cents each for every twenty-four hours, and the same being examined and approved by me; and three months having expired since the sale, and no person except the driver and his employers having claimed any part of the said cattle, the said sheriff is allowed to retain the sum of           dollars, for his commission and allowance as aforesaid, and is ordered to pay           dollars, being one half of the residue of the amount of sales, to the overseers of the poor of the           district, for the use of the said district; and           dollars, the other half of the said residue, to the said A J, the informer. Given under my hand, &c.

*(M) Order of restitution.*

To the sheriff, &c. of           county.

county, to wit :

Whereas B O hath this day appeared before me, J P, a justice of the peace for the said county, and duly proved his property to head of cattle, being part of a drove of           head, driven into this county from North Carolina by A D, and by me adjudged, on the day of           last past, on the complaint of A J, to be forfeited, for failure of the said A D to produce to the next justice of the county a manifest, &c. of the said cattle according to law. These are therefore to require you to restore to the said B O the said head of cattle, he first paying you for the same the sum of three cents per head each, for every twenty-four hours they have been maintained by you; and for so doing this shall be your warrant. Given, &c.

The foregoing precedents are drawn so as to suit those cases where all the business is conducted by the same magistrate. It may sometimes happen that process issued by one magistrate may be returned before another; in that case the precedents can easily be varied, so as to suit the particular situation of the case.

## CERTIORARI.

THIS writ, like many others in the law, derives its name from one of the initial words used in it, while all the proceedings were in Latin.

It is an original writ, issuing out of a superior court, directed to the judges of an inferior one, for the purpose of *certifying* or removing the records of a cause depending before such inferior court to a supe-

rior tribunal; and is usually granted upon a suggestion, supported by affidavit, that impartial justice will not be administered in the court below, in such cause.

Under this title will be shewn:

*I. In what cases it is grantable. II. In what manner to be granted and allowed. III. The effect of it. IV. The return of it.*

## I. IN WHAT CASES IT IS GRANTABLE.

A *Certiorari* lies in all judicial proceedings, in which a writ of error does not lie; and it is a consequence of all inferior jurisdictions erected by statute, to have their proceedings returnable into the superior court. *Ld. Raym.* 469, 580.

And therefore a *certiorari* lies to justices of the peace, even in such cases where they are empowered by statute finally to hear and determine. *Haw. B. 2. c. 27. s. 22, 23.*

But a *certiorari* shall never be granted to remove an indictment after a conviction, unless for some special cause; as where the judge below is doubtful what judgment to give. *Ibid.* sect. 31. But see *Ld. Raym.* 1452.

A *plaintiff* in an inferior court of equity will not be permitted to remove his cause by *certiorari*. *Wyatt's Pr. Reg.* 101.

See the case of *Coopers v. Saunders, &c.* (1 H. & M. 413, 420.) and judge Tucker's opinion in *Wingfield v. Crenshaw.* 3 H. & M. 245.

## II. IN WHAT MANNER TO BE GRANTED AND ALLOWED.

For proceedings on writs of *certiorari*, as regulated by the laws of Virginia, see 1 *Rev. Code*, p. 64, sect. 9; p. 67, sect. 51; p. 81, sect. 45; p. 81, 82, sect. 49, 50; p. 92, sect. 67; p. 163, sect. 26. Also, 2 *Rev. Code*, p. 135; p. 154, sect. 7; p. 155, sect. 12. *Sess. Acts*, 1808, ch. 6, sect. 13. See also, 2 *Str.* 1227. 3 *Burr.* 1262. 2 *Burr.* 749. 2 *Ld. Raym.* 1452. 4 *Burr.* 2456.

## III. THE EFFECT OF IT.

After a *certiorari* is allowed by the court below, it makes all the subsequent proceedings on the record that is removed by it erroneous. *Haw. B. 2. c. 27. sect. 62.*

But if a *certiorari*, for the removal of an indictment before justices of the peace, be not delivered before the jury be sworn for the trial of it, the justices may proceed. *Ibid.* sect. 64.

And the justices may set a fine to complete their judgment, after a *certiorari* delivered. *Ld. Raym.* 1515.

A *certiorari* removes all things done between the teste and return. *Ld. Raym.* 835, 1305.

A *certiorari* removes the record itself out of the inferior court, and therefore, if it remove the record itself against the principal, the accessory cannot there be tried. *Haw. B. 2. c. 29. sect. 54.*

And if the defendant be convicted of a capital offence, the person of the defendant must be removed by *habeas corpus*, in order to be present in court, if he will move in arrest of judgment. And herein the case of a conviction differs from that of a special verdict, where the presumption of innocence may be supposed to continue, and therefore the personal presence of the defendant in that case is not necessary at the argument of it. *2 Burr. 930.*

If a *supersedeas* comes out of a superior court to the justices, they ought to surcease, although the *supersedeas* be awarded against law; for they are not to dispute the command of a superior court, which is a warrant for them. *Cromp. 129.*

#### IV. THE RETURN OF IT.

Every return of a *certiorari* ought to be under the seal of the inferior court, or of the justice or justices to whom it is directed; and if such court have no proper seal, the return may well be made under any other. *Haw. B. 2. c. 27. s. 70.*

Also, every such return must be made by the very same person to whom the *certiorari* is directed. For if it be directed to the justices of the peace of such a place, and the clerk of the peace only return it; or to the constable, or to the recorder of B, and the deputy constable, or deputy recorder return it, without shewing in the return that the principal had power to make a deputy, nothing is removed. *Ibid. sect. 71.*

If the *certiorari* issue to use the record as evidence, then the tenor, if returned, is sufficient, and countervails the plea of *no such record*; but if the record is to be proceeded upon, the record itself must be removed, and this, whether it be before judgment or after; and in this case, the writ must be superseded, and not quashed, which can only be done on a view of the record itself. *2 Atk. [318.]*

If the person to whom a *certiorari* is directed make a false return, the court will not stay filing it, on affidavit that it is false, except in a public case; because the remedy for a false return is either an action on the case at the suit of the party, or an information at the suit of the commonwealth. *Dalt. c. 195.*

If the person to whom a *certiorari* is directed do not make a return, then an *alias*, that is, a second writ; then a *pluries*, that is, a third writ, or *causam nobis significes*, shall be awarded, and then an attachment. *Cromp. 116.*

Besides these general rules, which are common to all *certioraris*, there are many times special directions about them, in particular cases.

#### *Form of a return of a certiorari, to remove an indictment.*

First, on the back of the writ endorse these or the like words:

The execution of this writ appears in a schedule to the same writ annexed.

And that schedule may be thus, on a piece of a paper by itself, and annexed to the writ.

county, to wit :

I, J P, one of the commonwealth's justices of the peace for the county aforesaid, by virtue of this writ, to me delivered, do under my seal certify, unto the commonwealth's judges of the court of the indictment of which mention is made in the within writ, together with all things touching the same indictment. In witness whereof I, the said J P, have set my seal to these presents. Given at in the said county, the                      day of                      in the year of our Lord and in the                      year of our foundation.

Then take the record of the indictment, and close it within the schedule, and seal and send them up both together with the *certiorari*.

It must be observed, that the above form will not suit every return. However, it may easily be varied so as to comply with the injunctions of the writ, which is all that is necessary.

CHALLENGE. See JURIES.

CHAMPERTY. See MAINTENANCE.

CHANCE MEDLY. See HOMICIDE.

## CHEATS,

Punishable by public prosecution, are,

*I. By the common law. II. By statute.*

### I. BY THE COMMON LAW.

CHEATS, punishable by the common law, may in general be described to be deceitful practices, in defrauding, or endeavouring to defraud, another of his known right, by means of some artful device, contrary to the plain rules of common honesty ; as by playing with false dice, or by causing an illiterate person to execute a deed to his prejudice, by reading it over to him in words different from those in which it was written ; or by persuading a woman to execute writings to another, as her trustee, upon an intended marriage, which in truth contained no such thing, but only a warrant of attorney to confess a judgment ; or by suppressing a will, and such like. *Haw. B. 1. c. 71. sect. 1.*

2. It seems to be the better opinion, that the deceitful receiving of money from one man to another's use, upon a false pretence of having a message and order to that purpose, is not punishable by a criminal prosecution, because it is accompanied with no manner of artful contrivance, but wholly depends on a *bare naked lie* ; and it is said to be needless to provide severe laws for such mischiefs, against which common prudence and caution may be a sufficient security. *Ibid. sect. 2.*



3. Changing corn by a miller, and returning bad corn instead of it, is punishable by indictment; for being in the way of trade, it is deemed an offence against the public. (1 *Sess. Ca.* 217.) So also, to run a foot race fraudulently, and by a previous understanding with the seeming competitor to win money. (6 *Mod.* 42.) So also, if an indentured apprentice enlists as a soldier, and receives the bounty, and is discharged on his master's demanding him, he may be indicted. See 2 *Leach & Hawk.* (7th edit.) 114.

4. As there are frauds which may be relieved civilly, and not punished criminally (which are properly cognizable in courts of equity) so there are other frauds, which in a special case may not be helped, and yet shall be punished criminally. Thus, if a minor goes about the town, and pretending to be of age, defrauds many persons, by taking credit for considerable quantities of goods, and then insists on his non-age, the persons injured cannot recover the value of their goods, but they may indict and punish him for a common cheat. *Barl.* 100.

5. In the case of *K. v. Wheatly*, a distinction was taken between cheats merely of a private nature, and such as affect the public. The defendant was indicted and convicted of selling beer short of the due and just measure, to wit: sixteen gallons as and for eighteen. By the court; this is only an inconvenience and injury to a private person, arising from that private person's own negligence and carelessness in not measuring the liquor, upon receiving it, to see whether it held out the just measure or not. Offences that are indictable must be such as affect the public. As, if a man uses false weights and measures, and sells by them to all or many of his customers, or uses them in the usual course of his dealing; so, if there is a conspiracy to cheat: for these are deceptions that common care and prudence are not sufficient to guard against. These are much more than private injuries, they are public offences. But in the present case it is a mere private imposition or deception. No false weights or measures are used; no conspiracy; only an imposition on the person he was dealing with, in delivering him a less quantity instead of a greater; which the other carelessly accepted. It is only a non-performance of his contract, for which non-performance he may bring his action. So, the selling an unsound horse for a sound one is not indictable: the buyer should be more upon his guard. And the distinction which was laid down as proper to be attended to in all cases of this kind is this: That in such impositions or deceptions, where common prudence may guard persons against their suffering from them, the offence is not indictable, but the party is left to his civil remedy for the redress of the injury that has been done to him; but where false weights and measures are used, or false tokens produced, or such methods taken to cheat and deceive, as people cannot, by any ordinary care or prudence, be guarded against, there it is an offence indictable. *Burr.* 1125. *El. Rep.* 273.

6. Some of the above offences are punishable by fine and imprisonment, and other infamous punishment; others by fine and imprisonment only. See 2 *Leach & Hawk.* (7th edit.) 114.

## II. BY STATUTE.

By the laws of Virginia (1 *Rev. Code*, p. 45) which agree substantially with the stat. 33 *H. 8. c. 1.* it is enacted, "That, if any

person shall falsely and deceitfully obtain, or get into his or their hands or possession, any money, goods or chattels of any other person or persons, by colour and means of any *false token*, or *counterfeit letter*, made in any other man's name; every person so offending, and being thereof lawfully convicted in the court of the district in which such offence shall have been committed, shall have and suffer such correction and punishment, by imprisonment of his body, without bail or mainprise, for any space not exceeding one year, and setting upon the *pillory*, as shall be unto him limited, adjudged, or appointed by the said court."

Saving to the party injured such remedy by action, as if this act had never been made, &c.

☞ In the construction of the stat. 33 H. 8. c. 1. above referred to, lord Coke was of opinion, that the offender could not be *fined*, because it is expressly declared that some corporal punishment shall be inflicted, and no other is mentioned. (See 3 *Inst.* 133.) But, in *Terry's case* (*Cro. Car.* 564.) the offender was sentenced to stand on the pillory, to pay a *fine* of five hundred pounds, and to be bound with good sureties for his good behaviour. See 2 *L. Haw.* (7th edit.) 116.

"If any person shall fraudulently obtain, or aid, or assist in obtaining, from the bank of Virginia, or any of its offices of discount and deposit, any bank or post note, or money, by means of any forged or counterfeited check or order whatsoever, knowing the same to be forged or counterfeited, then every such person, being duly convicted thereof, shall be sentenced to suffer imprisonment in the jail and penitentiary house, for a period of time not less than two, nor more than ten years. 2 *Rev. Code*, p. 118.

To bring an offender within the statute, there must be a *false token* used; and therefore, where one man went to the house of another, and pretended that such a person had sent him to receive a sum of money, and he received it, whereas such person did not send him, it was held no offence. 2 *L. Haw.* (7th edit.) 116.

And it is not sufficient to aver in an indictment, that the offence was effected by a *false token*, it must shew what the false token was. 2 *Str.* 1137, *Rex v. Munoz*.

The false token must be used; and therefore, if a person endeavour, by a *counterfeit letter*, to defraud another of goods, and is apprehended on suspicion of such fraud, before he has got the goods into his possession, he is not within the statute. 2 *L. Haw.* (7th edit.) 117.

For cheating, in gaming, see title GAMING.

For precedents, see WARRANT, COMMITMENT, RECOGNIZANCE, and CRIMINALS.

## CLERGY. [BENEFIT OF]

THE privileges and disabilities of *clergymen*, as such, are confined within such narrow limits since the American revolution, that they do not seem to require any particular notice. The most important distinctions between that class of citizens and others are, their exclusion from a seat in the legislature, and the privy council, by the fourteenth article of the constitution of this state, their exemption from service in the militia (see 1 *Rev. Code*, p. 284. sect. 11. 2 *Rev. Code*, p. 43. sect. 14.) and their privilege from arrest, while performing religious worship. See 1 *Rev. Code*, p. 276. sect. 3.

But the *benefit of clergy*, which, during the times of papal usurpation, originated in an exemption claimed by those in holy orders, from criminal process before the secular judge, merits a considerable degree of attention; as the phrase is adopted in our laws to signify a commutation of capital punishment for burning in the hand.

The various mutations which this benefit of clergy has undergone from its first introduction into England may be seen in 4 *Bl. Com.* p. 365, 369.

At present, it is sufficient to observe, that the privilege is equally allowable to males and females; who, for the first offence, shall be discharged of the capital punishment of felonies within the benefit of clergy, on being burnt in the hand. 4 *Bl. Com.* 373.

But by the penitentiary law of 1796 (1 *Rev. Code*, p. 357, sect. 13.) "All claims to dispensation from punishment by benefit of clergy shall be and are hereby for ever abolished; and every person convicted of any felony, heretofore deemed clergyable, shall undergo an imprisonment at hard labour and solitary confinement, in the said jail and penitentiary house, for any time not less than *six months*, and not more than *two years*. By the twenty-fourth section, a person convicted of a crime not clergyable, who shall be convicted of such offence a second time, shall be imprisoned for life. And by act of 1799 (1 *Rev. Code*, p. 402.) it is declared, that from and after the period when the above mentioned act should go into operation (which was on the twenty-fifth of March, 1800) "If any *free person* shall be convicted (either as principal or accessory) of any felony or offence whatsoever, not already provided for by the said recited act, the punishment whereof by the laws in force, at and before the commencement of the said recited act, may amount to death, without benefit of clergy, every such offender, from whom the benefit of clergy would have been taken away, shall be sentenced to undergo a confinement in the jail and penitentiary house, for a period not less than *one*, nor more than *ten years*."

From the tenor of the above acts, as well as from the circumstance that the penitentiary law does not extend to *slaves*, it becomes necessary to ascertain what the law was, respecting the *benefit of clergy*, BEFORE the passing of those acts.

*I. Of clergy, by the common law. II. Of clergy, by statute. III. At what time it must be demanded. IV. The effect of clergy allowed.*

## I. OF CLERGY, BY THE COMMON LAW.

It has already been observed, that this privilege was peculiarly claimed by the clergy, or those in holy orders; and, until it was modified by several statutes, it was almost exclusively granted to them.

But in some cases it was not allowed by the common law, even to the clergy; as, in trespass, petit larceny, and high treason. 2 Hale 326.

Yet it was allowed, by the common law, in all cases of felony, except robbery on the high way, and arson, or house-burning. 2 Hale 333.

A woman by the common law could not have the benefit of clergy, but this is now remedied by statute.

## II. OF CLERGY, BY STATUTE.

By act of 1789 (1 Rev. Code, p. 45.) "The benefit of clergy shall not be allowed to principals in the first degree; 1st, in murder; (a) 2d, or in burglary; (b) 3d, or in arson at common law; (c) 4th, or for the wilful burning of any court-house, or county or public prison, or of the office of the clerk of any court within this commonwealth; (d) 5th, or for the felonious taking of any goods or chattels out of any church, chapel, or meeting-house, belonging thereto; (e) 6th, or for

(a) Murder in the first degree is still punishable with death (1 Rev. Code, p. 357. sect. 14.); but murder in the second degree, by confinement in the penitentiary, for a period not less than five nor more than eighteen years. (1 Rev. Code, p. 356. sect. 4.) For the definition of murder in the first and second degrees, see 1 Rev. Code, p. 356. sect. 2.; and for a further definition, see 2 Rev. Code, p. 15. sect. 1.

(b) Burglary, by act of 1796 (1 Rev. Code, p. 356. sect. 5.) was punishable by confinement in the penitentiary, for a period not less than three nor more than ten years; but by act of 1803, which commenced on the first of April, 1804 (see 2 Rev. Code, p. 70. sect. 1.) it is now punishable by confinement, for not less than five nor more than ten years.

(c) Arson, by act of 1796 (1 Rev. Code, p. 356. sect. 4.) was punishable by confinement, for not less than five nor more than twelve years; by act of 1803 (2 Rev. Code, p. 70. sect. 1.) for not less than ten nor more than twenty-one years; but by act of 1804 (2 Rev. Code, p. 80. sect. 8.) it is now punishable with death.

(d) The fourth class of offences is not provided for by the penitentiary law; of course it is punishable under the act of 1799 (1 Rev. Code, p. 402.) by confinement, for not less than one nor more than ten years.

(e) The remarks in the preceding note equally apply to this class of offences.

the robbing of any person or persons in their dwelling-houses or dwelling place, the owner or dweller in the same house or dwelling place, his wife, his children, or servants, then being within, and put in fear and dread by the same; (f) 7th, or for the robbing of any person or persons, in or near about any high way; (f) 8th, or for the felonious stealing of any horse, gelding, or mare; (g) 9th, or for the felonious breaking of any dwelling-house by day, and taking away of any goods or chattels, being in any dwelling-house, the owner or any person being therein and put in fear. (h)

II. The benefit of clergy shall not be allowed to principals in the second degree, in any of the cases abovementioned.

III. It shall not be allowed to accessories before the fact; 1st, in murder; 2d, or burglary; 3d, or arson at common law; 4th, or for the wilful burning of any court-house, or county or public prison, or of the office of the clerk of any court within this commonwealth; 5th, or for the robbing of any person or persons in their dwelling-houses or dwelling places, the owner or dweller in the same dwelling-house or dwelling place, his wife, his children or servants then being within, and put in fear and dread by the same; 6th, or for the robbing of any person or persons in or near about any highway. (i)

IV. It shall be allowed to principals and accessories in all offences which would otherwise be without clergy, whether the same be newly created by any act of the General Assembly, or exist under the common law, unless it be taken away by the express words of some act of Assembly.

V. It shall not be allowed to any person more than once, except in the following case, that is to say: Whensoever any person shall have been admitted to the benefit of clergy, such admission shall not operate as a pardon or discharge for other offences of a clergyable nature, committed by him before that admission to the benefit of clergy, but he shall be again allowed the benefit of clergy for every other offence of a clergyable nature committed by him, before that admission to the benefit of clergy, and shall be burned in the hand for every such offence.

VI. But if any person, who shall have been once admitted to the benefit of clergy, shall before that admission have committed any offence, in which the benefit of clergy is not allowed by law, or shall after that admission commit any offence in which the benefit of clergy is even allowed by law, he shall suffer death, without the benefit of clergy.

(f) Robbery has undergone the same mutations as burglary, and by the same laws; see, therefore, note (b.)

(g) Horse stealing, by the act of 1796 (1 *Rev. Code*, p. 356. sect. 6) was punishable by confinement, for not less than two nor more than seven years; but by act of 1803 (2 *Rev. Code*, p. 70. sect. 1) for not less than five nor more than ten years.

(h) See 4 *Tucker's Bl.* 240; and the editor's note (9) *Ibid.* 243. note (11)

(i) See title "PENITENTIARY," for those cases in which a specific punishment is prescribed for accessories; where they were not deprived of the benefit of clergy, their punishment is regulated by the thirteenth section of the act of 1796 (1 *Rev. Code*, p. 357.) which prescribes imprisonment in the penitentiary, for not less than six months nor more than two years.

VII. A female shall in all cases receive the same judgment, and stand in the same condition, with respect to the benefit of clergy, as a male.

VIII. A slave shall in all cases receive the same judgment, and stand in the same condition, with respect to the benefit of clergy, as a free negro or mulatto.

IX. Nothing in this act contained shall be construed to take away the benefit of clergy from any offence in which it is now allowed by any act of the General Assembly, or to allow it in any offence, from which it is now expressly taken away by any act of the General Assembly.

Besides the offences particularly enumerated in the foregoing law, there are several others, in which clergy was taken away by express acts of the legislature; which may be seen under title "LARCENY," and the respective titles interspersed throughout this volume.

By the statute 4 H. 7. c. 13, a person convicted of murder, and admitted to clergy, was directed to be burned with the letter M in the brawn of the left thumb; but in cases of other felony, with the letter T; probably from the word *Tyburn*, the general place of execution. But it had long been customary to burn the offender with any piece of iron scarcely heated; which *Sir Michael Forster* considers rather as a matter of absurd pageantry, than even a slight punishment.

But no man shall be ousted of his clergy a second time, by the bare mark in his hand, or by a parol averment, without the record testifying it; and it seems, that if he deny he is the same person, issue must be joined upon it, and tried to be the same person, before he can be ousted of clergy. 2 Hale 373.

If the law enacts generally, that it shall be felony without benefit of clergy, or that he shall suffer as in cases of felony without benefit of clergy, this excludes it in all circumstances and to all intents. 2 Hale 335.

In all cases where a subsequent law ousteth clergy in case of any felony created by statute, the indictment must precisely bring the party within the case described by the statute; otherwise, although possibly the fact itself be within the statute, and it may so appear upon the evidence, yet if it be not so alledged in the indictment, the party, though convict, shall have his clergy. 2 Hale 336.

But although the case be so laid in the indictment as to bring it within the statute, and oust the prisoner of clergy, yet, if upon the evidence it appears to be without the statute, and a felony only, the jury ought to find him guilty of the felony only, and not of the matter laid in the indictment, and thereupon the prisoner shall be admitted to his clergy. And this is commonly done." *Ibid*.

However, if the offence was capital at common law, and a statute only excludes it from clergy, the indictment, in such case, need not conclude, against the form of the statute, because the statute doth not alter the nature of the offence, but leaves it to its proper judgment, and only takes away a personal privilege or exemption from such judgment. *Haw. B. 2. c. 33. sect. 25.*

Where an act taketh away clergy from the principal, and saith nothing of the accessory, the accessories before as well as after the fact shall have their clergy. 11 Co. 37. *Post. 355.*

### III. AT WHAT TIME IT MUST BE DEMANDED.

By the ancient common law, the benefit of clergy was demanded as soon as the prisoner was brought to the bar, before any indictment or proceeding against him. But this was found a great inconvenience to the prisoner, because possibly he might have been acquitted of the felony; or if not, yet in case of an inquest of office he lost his challenge to such inquest, and upon such inquest found, he lost his goods and the profits of his land. And therefore, C. J. Prisot, with the advice of the other judges, in the reign of Henry VI. for the safety of the innocent, would not allow the prisoner the benefit of clergy before he had pleaded to the felony, and (having the benefit of his challenges and other advantages) had been convicted thereof; which course hath been generally observed ever since. 2 *Inst.* 164. 2 *Hale* 378.

And this benefit of clergy may be allowed by the court in discretion, though the party challenge it not. *Summ.* 239.

### IV. THE EFFECT OF CLERGY ALLOWED.

A person receiving the benefit of clergy, by being burnt in the hand, is restored to his credit, and may be a good witness. *Haw. B.* 2. c. 33. sect. 129.

And it is holden, that after a man is admitted to his clergy it is actionable to call him felon; because his offence being pardoned by the statute, all the infamy and other consequences of it are discharged. *Ibid.* sect. 132.

## COIN.

See title "Coin," in *Appendix No. 2*, to this work.

TO counterfeit, aid or abet in counterfeiting; any coin made current in this commonwealth, or to make, or assist, aid or abet in making base coin, or to pass any such counterfeit or base coin, knowing it to be counterfeit or base, was felony without benefit of clergy. (See 1 *Rev. Code*, p. 249, sec. 1.) But it is now punishable by confinement in the penitentiary, for not less than *four* nor more than *fifteen* years. *Ibid.* p. 356, sect. 9.

## COMMITMENT.

WHEN a person is arrested, by any of the means mentioned under title ARREST, and brought before a magistrate, he should, after examining into the nature and circumstances of the crime alledged, either *discharge, bail, or commit him.* 4 *Bl. Com.* 296.

*I. Who may be committed, and to what place. II. The form of the commitment. III. That the jailor shall receive the prisoner. IV. Shall certify the commitment. V. Commitment discharged. VI. Precedents of commitments.*

### I. WHO MAY BE COMMITTED, AND TO WHAT PLACE.

If the offence be not bailable, or the party cannot find bail, he is to be committed to the county jail by the *mitimus* of the justice, or warrant under his hand and seal, containing the cause of his commitment; there to abide till delivered by due course of law. 4 *Bl. Com.* 300.

And wheresoever a justice is empowered by any statute to bind a person over, or to cause him to do a certain thing, and such person being in his presence shall refuse to be bound or to do such thing, the justice may commit him to the jail, to remain there till he shall comply. *Haw. B. 2. c. 16, sect. 2.*

If a prisoner be brought before a justice, expressly charged with felony upon oath, the justice cannot discharge him, but must bail or commit him. 2 *Hale* 121.

But if he be charged with suspicion only of felony, yet, if there be no felony at all proved to be committed, or if the fact charged as a felony be in truth no felony in point of law, the justice may discharge him: as, if a man be charged with felony for stealing a parcel of the freehold, or for carrying away what was delivered to him, and such like, for which though there may be cause to bind him over as for a trespass, the justice may discharge him as to felony, because it is not felony. But if a man be killed by another, though it be by misadventure, or self defence (which is not properly felony) or in making an assault upon a minister of justice in the execution of his office (which is not at all felony) yet the justice ought not to discharge him, for he must undergo his trial for it; and therefore he must be committed, or at least bailed. *Ibid.*

But commitment by the justices of the peace almost in all cases (except for the peace, good behaviour, felony, or higher offences) is



but to retain the party till he hath made fine; and therefore, if he offer to pay it, or find sureties by recognizance to pay it, he ought not to be committed, but to be delivered presently. *Dalt. c. 170.*

## II. THE FORM OF THE COMMITMENT.

1. It must be in writing, either in the name of the commonwealth, and only tested by the person who makes it, or it may be made by such person in his own name, expressing his office, or authority, and must be directed to the jailor, or keeper of the prison. *Haw. B. 2. c. 16. sect. 13, 14.*

Yet the mention of the name and authority of the justice in the beginning of the mittimus is not always necessary, for the seal and subscription of the justice to the mittimus is sufficient warrant to the jailor, for it may be supplied by averment, that it was done by the justice. 2 *Hale* 122.

2. It should contain the name and surname of the party committed, if known; if not known, then it may be sufficient to describe the person by his age, stature, complexion, colour of his hair, and the like, and to add, that he refuseth to tell his name. 1 *Hale* 577.

3. It is safe, but not necessary, to set forth, that the party is charged upon oath. *Haw. B. 2. c. 16. sect. 17.*

4. It ought to contain the cause, as for treason, or felony, or suspicion thereof; otherwise, if it contain no cause at all, if the prisoner escape, it is no offence at all: whereas, if the mittimus contained the cause, the escape were treason or felony, though he was not guilty of the offence. 2 *Inst.* 52.

And hereupon it appeareth, that a warrant or mittimus to answer to such things as shall be objected against him is utterly against law. 2 *Inst.* 591.

Also it ought to contain the certainty of the cause; and therefore if it be for felony, it ought not to be generally for felony, but it must contain the special nature of the felony, briefly, as, for felony, *for the death of such an one*, or, for burglary, *in breaking the house of such an one*: and the reason is, because it may appear to the judges, upon an *habeas corpus*, whether it be felony or not. 2 *Hale* 122. See 3 *Bl. Com.* 134.

But the want hereof seems not to make the commitment absolutely void, so as to subject the jailor to a false imprisonment; but it lies in a verdict to excuse the jailor or officer, that the matter was for felony. 1 *Hale* 584.

5. It must have an apt conclusion; as, if it is for felony, to detain him till he be thence delivered by law, or by order of law, or by due course of law. 2 *Hale* 123. *Haw. B. 2. c. 16. sect. 18.*

But if the conclusion be irregular, it doth not seem to make the warrant void, but the law will reject that which is surplusage, and the rest shall stand; so that if the matter appear to be such for which he is to remain in custody, or to be bailed, he shall be bailed or committed, as the case requires, and not discharged; but the wrong conclusion shall be rejected. 1 *Hale* 584.

It is also to be observed, that a commitment grounded on a statute ought to be conformable to the method prescribed by it. As where the overseers were committed for refusing to account, and the warrant concluded in the common form, until they be duly discharged according to law; upon the return of an *habeas corpus*, the court held the commitment void, because the warrant ought to have concluded, there to remain until he shall account as the 43. *El. c. 2.* doth appoint. And a difference is, where a man is committed as a criminal, and where only for contumacy; in the first case, the commitment must be, until discharged according to law; but in the latter, until he comply. 2 *Haw. Not. 33.*

Where a statute appoints imprisonment, but limits no time how long, in such case the prisoner must remain at the discretion of the court. *Dalt. c. 170.*

6. It must be under seal; and without this the commitment is unlawful, the jailor is liable to false imprisonment, and the wilful escape by the jailor, or breach of prison by the felon, makes no felony. 1 *Hale 583.*

But this must not be intended of a commitment by the sessions, or other court of record; for there the record itself, or the memorial thereof, which may at any time be entered of record, is a sufficient warrant, without any warrant under seal. 1 *Hale 584.*

It should also set forth the place at which it is made (that it may appear to be within the jurisdiction of the justice.) *Haw. B. 2. c. 16, sect. 13.*

It must also have a certain date, of the year and day. 2 *Hale 122.*

But although the above circumstances are proper and fit, yet it seems that a commitment is not void, which does not contain all of them. 2 *Hale 123.*

### III. THAT THE JAILOR SHALL RECEIVE THE PRISONER.

If the jailor shall refuse to receive a felon, or take any thing for receiving him, he shall be punished for the same by the justices. *Dalt. c. 170.*

It seems that regularly no one can justify the detaining a prisoner in custody out of the common jail, unless there be some particular reason for so doing; as, if the party be so dangerously sick, that it would apparently hazard his life to send him to jail, or there be evident danger of a *rescous* from rebels, or the like. *Haw. B. 2. c. 16. sect. 9.*

### IV. SHALL CERTIFY THE COMMITMENT.

The jailor being an officer bound to give his attendance at court, to bring thither his prisoners, and to receive such as may be committed, (*Dalt. c. 195*) ought always to certify his commitment with the prisoner.

## V. COMMITMENT DISCHARGED.

A person legally committed for a crime, certainly appearing to have been done by some one or other, cannot lawfully be discharged till he be acquitted on his trial, or have an *ignoramus* (*not a true bill*) found by the grand jury, or none to prosecute him, on a proclamation for that purpose made by the justices. But if a person be committed on a bare suspicion, without any indictment, for a supposed crime, where afterwards it appears that there was none, as for the murder of a person thought to be dead, who afterwards is found to be alive, he may be safely dismissed without any farther proceeding, for that he who suffers him to escape is properly punishable only as an accessory to his supposed offence; and it is impossible that there should be an accessory, where there can be no principal; and it will be hard to punish one for a contempt, in disregarding a commitment founded on suspicion, appearing in so uncontested a manner to be groundless. *Haw. B. 2. c. 16. sect. 22.*

## VI. PRECEDENTS OF COMMITMENTS.

1. *General warrant of commitment.*

To \_\_\_\_\_ county, to wit,  
(sheriff or constable, *as the case may be*) and to the keeper of the jail in the said county.

These are to command you, the said sheriff (or constable) in the name of the commonwealth, forthwith to convey and deliver into the custody of the said keeper of the said jail, the body of A O, of &c. charged before me of \_\_\_\_\_ &c. (here describe the offence.) And you the said keeper are hereby required to receive the said A O into your custody in the said jail, and him there safely to keep, until he shall thence be discharged by due course of law. Given under my hand and seal, at the county of \_\_\_\_\_ said, this \_\_\_\_\_ day of \_\_\_\_\_ in the year \_\_\_\_\_ &c.

2. *Mittimus for felony.*

county, to wit.

To the keeper of the jail of the said county.

Whereas A O, late of \_\_\_\_\_ &c. labourer, hath been arrested for suspicion of a felony by him, as it is said, committed, in stealing of the value of \_\_\_\_\_ the property of \_\_\_\_\_ of \_\_\_\_\_ &c. Therefore, on behalf of the said commonwealth, I command you, that you receive the said A O into your custody in the said jail, there to remain, till he be delivered from your custody by due course of law. Given under my hand and seal, at the said county, the \_\_\_\_\_ day of \_\_\_\_\_ in the year \_\_\_\_\_ and in the \_\_\_\_\_ year of the commonwealth.

3. *Another.*

county, to wit.

J. P., a justice of the peace for the said county, to the keeper of the jail in the said county.

These are in the commonwealth's name to charge and command you, that you receive into your said jail the body of A O, late of in the said county, yeoman, taken by A C, constable, of in the said county, and by him brought before me for suspicion of felony, that is to say, for stealing and that you safely keep the said A O in your said jail, until he shall thence be delivered by due course of law. Given under my hand and seal, &c.

4. *Another.*

county, to wit.

To the keeper of the jail in the said county.

I send you herewith the body of A O, late of &c. labourer, taken and brought before me for, &c. (here describe the offence.) And you the said jailor are hereby commanded to receive the said A O into your jail and custody, and him there safely to keep, till he shall be thence discharged by due course of law. Given under my hand and seal, &c.

5. *Mittimus, in the name of the commonwealth.*

county, to wit.

The commonwealth of Virginia to the keeper of the jail of the said county, greeting:

Whereas A O, late of in the said county, yeoman, is arrested for suspicion of felony by him, as it is said, committed, in feloniously taking and carrying away of the value of the property of You are, therefore, commanded to receive the said A O into your custody in the said jail, there to remain, till he be delivered out of your custody by the laws of the commonwealth. Witness J P, one of the commonwealth's justices assigned to keep the peace for the said county, at the county aforesaid, this day of in the year and in the year of the commonwealth.

## CONFESSION.

AN express confession is the highest conviction that can be. *Haw. B. 2. c. 31. sect. 1.*

Upon a simple and plain confession of the indictment, the court hath nothing to do but to award judgment; but it is usually very backward in receiving and recording such confession, out of tenderness to the life of the prisoner; and will generally advise him to retract it, and plead to the indictment. 4 *Bl. Com.* 329.

An implied confession is where a defendant, in a case not capital, doth not directly own himself guilty, but in a manner admits it, by yielding to the mercy of the court, and desiring to submit to a small fine, which the court may accept, without putting him to a direct confession. *Haw. B. 2. c. 31. sect. 3.*

But no confession whatsoever shall, before final judgment, deprive the defendant of the privilege of taking exceptions, in arrest of judgment, to faults apparent in the record; for the judges must, *ex officio*, take notice of all such faults, and any one as *amicus curie* may inform them. *Ibid. sect. 4.*

The confession of the defendant, taken on an examination before justices of the peace, or in discourse with private persons, it is said, may be given in evidence against the party confessing, but not against others. (4 *Haw.* seventh edit. 624.) But it should be observed, that this examination of the offender, being taken in pursuance of the statute of England of 1 & 2 P. & M. c. 13. which is not in force in this country, the trial of a criminal in this state must be governed by the rules of the common law, and our own acts of Assembly; neither of which will justify his own examination in order to convict him. See 4 *Bl. Com.* 296.

The human mind under the pressure of calamity is easily seduced, and liable, in the alarm of danger, to acknowledge indiscriminately a falsehood or a truth, as different agitations may prevail; a confession, therefore, which is obtained from a defendant, either by the flattery of hope, or by the impressions of fear, however slightly the emotions may be planted, is not admissible evidence; for the law will not suffer a prisoner to be made the deluded instrument of his own conviction. *Leach's case in Cr. L.* 222. *Warwickshall's case*, 4 *Haw.* (7th edit.) 425. See also, 4 *Bl. Com.* 357.

But if any facts arise in consequence of even such a confession, they may be given in evidence; because they must ever be immutably the same, whether the confession which disclosed them be true or false; and justice cannot suffer by their admission. The truth of these contingent facts, however, must be proved independently of, and not coupled with, or explained by, the conversation or confession from which

they are derived. *Leach's case*, in *Cr. L.* 224. *Maxey's case*, 4 *Haw.* (7 edit.) 425.

Thus where the prisoner, in consequence of promises of favour, had discovered the stolen goods, which were accordingly found in her possession, it was said by Justice Butler, present *Baron Ferryn*, who agreed, "Whatever *acts* are done, are evidence; but if those acts are not sufficient to make out the charge against the prisoner, the conversation or confession of the prisoner cannot be received, so as to couple it with those acts, in order to make out the subject matter of proof. A prisoner was tried before me (*Mr. Butler*) where the evidence was just as it is here. 'I stopped all the witnesses when they came to the confession. The prisoner was acquitted. There were two learned judges on the bench, who told me, that although what the prisoner said was not evidence, yet that any *facts* arising afterwards must be received. This point, though it did not affect the prisoner at the bar, was stated to *all the judges*; and the line drawn was, that although confessions improperly obtained cannot be received in evidence, yet that the *acts* done afterwards may be given in evidence, though they were done in consequence of the confession.'" *Leach's Cr. L.* 250. note (a)—*Maxey's case*.

So it was held by the court, in *Lockhart's case*, that although a confession improperly obtained cannot be given in evidence, yet it can never go to the rejection of the evidence of other witnesses, which are got at in consequence of such confession. *Leach's Cr. L.* 300. *Lockhart's case*. 4 *Haw.* (7 edit.) 425.

It was once held, that a prisoner could not be convicted on the single, uncorroborated, evidence of his own confession. Thus, in *Alexander Fisher's case*, the prisoner was indicted for burglariously breaking and entering the dwelling house of *Benjamin Ward*, and stealing therein four gold watches of a considerable value; to which indictment he had pleaded *Not Guilty*. The prosecutor proved that the burglary had been committed, and that the watches were stolen; but there was no evidence whatever to bring the charge home to the prisoner, except a confession of the fact, which he had freely and voluntarily made before a justice, on his examination; but it was not reduced into writing. *The Court*. It is an established rule of law, that the mere confession of a crime, without any one single circumstance to corroborate it, is not sufficient to convict a prisoner, unless he should again confess the fact, by pleading *guilty* to the indictment. *Leach's Cr. L.* (1 edit.) 319.

But it has since been held, that the bare confession, regularly proved at the trial, is sufficient, without any corroborating evidence to support it. See 4 *Haw.* (7 edit.) 425. *Leach's Cr. L.* (2 edit.) 286.

# CONSPIRACY.

## *I. What it is. II. How punishable.*

### I. WHAT IT IS.

1. BY the common law, all confederates whatsoever, wrongfully to prejudice a third person, are highly criminal; as where divers persons confederate together by indirect means to impoverish a third person, or falsely and maliciously to charge a man with being the reputed father of a bastard child, or to maintain one another in any matter, whether it be true or false. *Haw. B. 1. c. 72. sect. 2.*

2. Journeymen confederating and refusing to work, unless for certain wages, may be indicted for a conspiracy; for the offence consists in the conspiring, and not in the refusal, and all conspiracies are illegal, although the subject matter of them may be lawful. (8 *Mod.* 11.) So, also, a bare conspiracy to do a lawful act, to an unlawful end, is a crime, although no act be done in consequence thereof. (8 *Mod.* 321.) And the fact of conspiring need not be proved on the trial, but may be collected by the jury from collateral circumstances. (1 *Bl. Rep.* 392. 1 *Stra.* 144.) And if the parties concur in doing the act, although they were not previously acquainted with each other, it is conspiracy. See 2 *Leach's Haw.* (7th edit.) 122. 4 *Bl. Com.* 137. *Christian's note* (4.) See also, *the trial of the Journeymen boot and shoe makers of Philadelphia*, reported by *Lloyd*, 1806.

3. "Conspirators be they that do confederate and bind themselves by oath, covenant, or other alliance, that every of them shall aid and bear the other falsely and maliciously to move, or cause to be moved, any indictment or information against another on the part of the commonwealth, and these who are convicted thereof, at the suit of the commonwealth, shall be punished by imprisonment and amercement, at the discretion of a jury." 1 *Rev. Code*, p. 30.

4. From this definition of conspirators, it seems clearly to follow, contrary to the opinion of lord *Coke*, that not only those who actually cause an innocent man to be indicted, and also to be tried upon the indictment, whereupon he is lawfully acquitted, are properly conspirators, but that those also are guilty of this offence, who barely conspire to indict a man falsely and maliciously, whether they do any act in prosecution of such conspiracy or not. *Haw. B. 1. c. 72. sect. 2. Ld. Raym.* 1169.

5. But an action will not lie for the conspiracy, unless it be put in execution; for in such case, the *damage* is the ground of the action. *Ld. Raym.* 378.



6. Also, it plainly appears from the words of the statute, that one person alone cannot be guilty of conspiracy, within the purport of it ; from whence it follows, that if all the defendants who are prosecuted for such a conspiracy be acquitted, but one, the acquittal of the rest is the acquittal of that one also : and upon the same ground it hath been holden, that no such prosecution is maintainable against a husband and wife only, because they are esteemed but as one person in law ; but an action on the case, in the nature of a conspiracy, may be brought against one only ; also, if such an action be brought against several persons, and all but one be acquitted, yet judgment may be given against that one only. *Haw. B. 1. c. 72. sect. 8.*

7. The husband and wife, and servants, were indicted for a conspiracy to ruin the trade of the prosecutor, who was the king's card maker. The evidence against them was, that they at several times had given money to the prosecutor's apprentices, to put grease in the paste, which had spoiled the cards. But there was no account given, that ever more than one at a time was present, though it was proved they had all given money in their turns. It was objected, that this could not be a conspiracy ; for several persons might do the same thing, without having any previous communication with each other. But it was ruled, that the defendants being all of a family, and concerned in making of cards, it would amount to evidence of a conspiracy. *Str. 144. Rex v. Cope and others.*

8. An information was brought against *Kinnersley* and *Moore*, setting forth that the defendants, being evil disposed persons, in order to extort money from my lord *Sunderland*, did conspire together, to charge my lord with endeavouring to commit sodomy with *Moore*. One defendant only appeared, and pleaded to issue, and was found guilty. And now exception was taken in arrest of judgment, that to every conspiracy there must be two persons at least ; whereas here is only one brought in and found guilty, and the other possibly may be acquitted. But it was answered, that this is arguing from what has not happened, and probably never will ; for though *Moore* may have an opportunity to acquit himself, and is not concluded by the verdict, as *Kinnersley* is, yet, as the matter now stands, *Moore* himself is found guilty, for the conspiracy is found as it is laid, and therefore judgment may be given against one, before the trial of the other. And a case was quoted, where several were indicted for a riot, *with many others*, and two only were found guilty ; and it was objected, that there must be three to make a riot ; but upon the words, *with many others*, judgment was given against the defendants. And the court overruled the exception. And the defendant had sentence. And in the *Easter* term following, *Moore* also was convicted, and had judgment. *Str. 193.*

9. *Eliz. Niccols* was indicted for conspiring with *Tho. Bygrave*, unjustly to charge *William Frankland* with a robbery, and for that purpose going before a justice, where *Bygrave* swore it upon him : *Niccols* only came in and pleaded not guilty, and the jury found that she was guilty, but that *Bygrave* died before the indictment was preferred. Exception was taken, that one alone cannot be guilty of a conspiracy, and here is but one convicted. But the court overruled this, on the authority of *Kinnersley's* case, in which case there was a



possibility of contradictory verdicts, which here cannot be. *Str.* 1227. See 2 *Leach's Haw.* (7th edit.) 125.

¶ As to laying the offence in an indictment, see 1 *Bl. Rep.* 368. 3 *Burr.* 1320. *Cro. Cir. Assist.* 190, 216. 2 *Leach's Haw.* (7th edit.) 122.

10. The getting of money out of a man, by conspiring to charge him with a false fact, is indictable, whether the fact charged be or be not criminal in itself; even though it only affect his reputation. 1 *Bl. Rep.* 368.

11. There is a difference between an *action of conspiracy* against two persons, and an action on the case, founded on a wrong done by two persons; in the first, if one be found *not guilty*, the judgment must be arrested, but not so, if one be found *not guilty*, in the latter case. 1 *Wils.* 210.

## II. HOW PUNISHED.

Conspirators may be indicted at the suit of the commonwealth, and were by the ancient common law to receive what is called *villanous* judgment; viz. to lose their *liberam legem*, whereby they are discredited, and disabled as jurors or witnesses; to forfeit their goods and chattels and lands for life; to have those lands wasted, their houses razed, their trees rooted up, and their own bodies committed to prison. But it is now the better opinion, that the *villanous* judgment is by long disuse become obsolete; it not having been pronounced for some ages (not since the reign of *Edward the Third*. *Burr.* 996, 1027.) but instead thereof, the delinquents are usually sentenced to imprisonments, fine, and pillory. (4 *Bl. Com.* 136.) Thus, in the case of *Kinnersley* and *Moore*, above-mentioned, *Kinnersley* was sentenced to be fined five hundred pounds, to suffer a year's imprisonment, and to find sureties for his good behaviour for seven years. *Moore* was sentenced to stand in the pillory, suffer a year's imprisonment, and to find sureties in like manner for seven years. 1 *Stra.* 196.

## CONSTABLE.

1. VARIOUS as the conjectures have been among the learned, with respect to the origin of this word, and the antiquity of the office, they all agree that it was once an office of considerable trust and consequence in England, particularly in pleas of the crown. See *Burn's Just.* title "CONSTABLE."

2. These officers were very early recognised by the laws of Virginia. By an act of 1643 (see 1st vol. *Hen. Stat. at Large*, p. 246.) it was made the duty of constables to present to the commissioners of monthly courts, such of the inhabitants as failed to plant two acres of corn for each labouring person. Various other laws, before the revo-

lution, impose particular duties on constables. By the fifteenth article of the constitution of Virginia, it is provided, that the "justices shall appoint constables," &c. ; and by act of 1802 (2 *Rev. Code*, p. 4.) the county and corporation courts are directed to appoint them. Before these *express* provisions, it was the practice in Virginia, for the county courts to appoint constables ; analogous to the proceedings in the sheriff's *turn*, or *lect*, in England. See *Haw. B. 2. c. 10. sect. 37. &c. 1 Burn's Just. 389.*

3. Every constable is, by the common law, a principal conservator of the peace. *Haw. B. 2. c. 8. sect. 6. 1 Bl. Com. 375.*

4. And if the constable is assaulted in the execution of his office, he need not go back to the wall, as private persons ought to do : and if in the striving together, the constable kills the assailant, it is no felony ; but if the constable is killed, it shall be construed premeditated murder. *Summ. 37. 1 Hale 457. Wood. Inst. 86. 4 Bl. Com. 293. 1 Burn's Just. 394.*

5. The constable may command all persons to assist him, to prevent a breach of the peace ; and if any one refuses, he may be bound over to the sessions (or county court) and fined. *Wood. Inst. 86.*

6. The constable is the proper officer to a justice of the peace, and bound to execute his warrants ; and therefore, where a statute authorises a justice of the peace to convict a man of a crime, and to levy the penalty by warrant of distress, without saying to whom such warrant shall be directed, or by whom it shall be executed, the constable is the proper officer to execute it, and indictable for disobeying it. *Haw. B. 2. c. 10. sect. 35. 1 Salk. 381. 2 Ld. Raym. 1189.*

7. The constable must carry the offender before the justice, according to the direction of the warrant ; but if the warrant be not special, viz. returnable before a particular justice, the constable may carry the party before any justice. (*Wood. Inst. 87.*) But, in civil process, he must return his warrant before some justice within his district. 2 *Rev. Code*, p. 124. sect. 2.

8. A constable may appoint a deputy, to do ministerial acts. *Per Ld. Mansfield; 3 Burr. 1262.*

☞ For more of the power and duty of constables, at common law, see titles ARREST, AFFRAY, and WARRANT.

By the laws of Virginia (2 *Rev. Code*, c. 8. sect. 1.) it is made the duty of the county and corporation courts, in the month of June, every two years, to appoint constables, who at the next court are to take the necessary oaths, and give bond, with two sureties (in a penalty not less than five hundred, nor more than fifteen hundred, dollars (2 *Rev. Code*, p. 124. sect. 1.) payable to the governor and his successors, with condition well and truly to discharge the duties of the office ; which oaths and bond shall be repeated at the end of every two years ; vacancies occasioned by death, removal, or resignation, are to be supplied by new appointments, with the like oaths and bond ; the bonds are to be recorded in the court where they are executed, and may be sued on as sheriff's bonds ; any person executing the office of constable without taking the oaths and giving bond, forfeits fifty dollars, to the use of the county or corporation, recoverable by action of debt, in the name of the governor for the time being : *Provided*, that any justice may ap-

point any person to act as a constable in *criminal cases* as heretofore. 2 *Rev. Code*, c. 8. sect. 1. p. 4, 5.

The county courts, when they appoint constables, are to lay off their respective counties into districts, and assign one or more constables to each; who are to confine themselves, in the service of warrants and executions, to their own districts, and return all warrants to some place therein; under the penalty of five dollars for every offence, recoverable by motion, on ten days notice, against the constable, his securities, executors, &c. of each, before the court of the county wherein he was appointed. 2 *Rev. Code*, p. 124. sect. 2.

On the death, resignation, removal, or refusal to act, of any constable assigned to a district, any constable of the county may perform the duties of a constable in such district. *Sess. Acts*, 1808. c. 11. sect. 2. p. 20.

No sheriff, or deputy-sheriff, shall serve any warrant for debt, detinue, or trover, issued by a justice, and finally cognizable by one; but such warrant shall be directed to, and served by, some constable. (*Sess. Acts*, 1808. c. 11. sect. 1. p. 20.) In like manner, all executions, awarded by a justice for debt, detinue, or trover, shall be directed to some constable. *Sess. Acts*, 1808, c. 11. sect. 3. p. 21.

### *Fees of Constables.*

(See 2 *Rev. Code*, p. 5. sect. 2.)

	<i>Dols.</i>	<i>Cts.</i>
For serving a warrant	-	30
For summoning a witness	-	21
For summoning a coroner's jury and witnesses	3	15
For putting in the stocks	-	21
For whipping a slave (to be paid by the owner)	-	42
For serving an attachment, returnable before a justice	-	63
For summoning each garnishee, on an attachment	-	21
For selling property taken by execution or attachment, where the amount does not exceed five dollars;	-	25
And where the amount exceeds five dollars, five per cent. on the balance;		
And where the property is not sold, but the money paid to the constable, the same fees as if sold.		
For serving an attachment, returnable to a county court, against an absconding debtor	-	63
For serving a warrant of distress	-	63
For serving an attachment for rent	-	63
For every bond taken from the purchaser, on a sale of a distress for rent	-	63
For removing every person suspected of becoming chargeable to the county, to be paid by the overseers of the poor, for every mile	-	4
For carrying any person to jail, on a warrant from a justice, for every mile	-	10
For taking a replevy bond, on levying a distress for rent, the same fees as for taking forthcoming bonds, to be included in such bonds. See 1 <i>Rev. Code</i> , c. 270. p. 405.		

Constables are allowed for arrests, in criminal cases, and summoning witnesses, the same fees as are allowed the sheriff in civil cases for the like services; and constables and guards, employed in conveying prisoners to the county jail, shall have the same allowances as are made to sheriffs and guards removing prisoners to the penitentiary; to be paid out of the public treasury. See 2 *Rev. Code*, p. 83, 84.

Fees of constables, due by persons residing out of their county or district, are to be collected by the sheriff as sheriffs' fees; but every constable may distrain for his fees in his own district. 2 *Rev. Code*, p. 6.

Every constable who shall demand and receive any fee, where, by law, he is not entitled, or more than the legal fees, shall forfeit to the party injured three dollars; and shall, moreover, pay double the sum improperly received; recoverable by motion, on ten days notice, in the court wherein he was appointed, against him and his securities, his or their executors, &c. 2 *Rev. Code*, p. 124. sect. 3.

Any process of attachment against absconding debtors, or against tenants for rent, may be executed and returned by constables, in the same manner as by sheriffs. 2 *Rev. Code*, p. 5. sect. 2.

Every constable levying an execution, must advertise the property, at some public place in the neighbourhood, at least ten days previous to the sale. 2 *Rev. Code*, p. 6. sect. 5.

Constables, and other officers, in returning executions by them levied or settled, and the monies thereon received, or any part thereof, are to make a statement, on the execution, of the amount, including their own fees and commissions. 2 *Rev. Code*, p. 16. sect. 2.

If any constable shall fail to return an execution on or before the return day (which shall in no case exceed sixty days from the date) any justice, on ten days notice, upon the motion of the party injured, may fine such constable not exceeding five per cent. a month, on the amount of the execution, counting from the return day. 2 *Rev. Code*, p. 116. sect. 10.

Or, for failing to pay money received on an execution issued by a justice, upon the return thereof, the same remedy is given to the party injured, his executors, &c. against the constable and his securities, his or their executors, &c. as is provided in the case of sheriffs; and the court, in which the bond of the constable is recorded, may hear the motion, and render judgment. 2 *Rev. Code*, p. 116. sect. 13. *which is an amendment of section 3. p. 5, 6.*

If a constable can find no property whereon to levy an execution issued by a justice, he must make return thereof to the clerk's office; whereupon a *ca. sa.* may issue, as in other cases. See 2 *Rev. Code*, p. 116. sect. 8.

It is the duty of every constable to give information against, and prosecute every free negro or mulatto, who shall keep or carry fire arms or ammunition, contrary to law. 2 *Rev. Code*, c. 88. sect. 2. p. 108, 109.

Also, to apprehend and carry before a justice, slaves who are permitted to go at large and hire themselves out. 2 *Rev. Code*, c. 119. sect. 1. p. 147.

Constables are exempted from serving on grand juries. 1 *Rev. Code*, p. 100. sect. 2.

Also, from the payment of county levies. 1 *Rev. Code*, p. 250. sect. 2.

## CONVICTS.

"FROM and after the first day of January, 1809, no captain or master of any vessel, or any other person, coming into this commonwealth, by land or by water, shall import or bring with him, any person who shall have been a felon convict, or under sentence of death, or any other legal disability incurred by a criminal prosecution, or who shall be delivered to him from any prison or place of confinement, out of the United States."

"Every captain or master of a vessel, or any other person, who shall presume to import or bring into this commonwealth, by land or by water, or shall sell, or offer for sale, any such person as above described, shall suffer three months imprisonment, without bail or mainprize, and forfeit and pay for every such person so brought and imported, or sold, or offered for sale, the penalty of fifty pounds current money of Virginia, one half to the commonwealth, and the other half to the person who shall give information thereof; which said penalty shall be recovered by action of debt or information, in any court of record, in which the defendant shall be ruled to give special bail." 1 *Rev. Code*, c. 35. p. 39.

## CORONER.

CORONERS are ancient officers, by the common law, so called, because they deal principally with the pleas of the crown, and were of old times the principal conservators of the peace within their county. *Haw. B. 2*, c. 39. sect. 1.

Among the acts of parliament of England, which have been ingrafted into our *Revised Code* of 1792, so much of the statutes of 3 *Edw.* 1. c. 10. 14 *Edw.* 3. c. 8. 1 *Hen.* 8. c. 7. 4 *Edw.* 1. stat. 1. sect. 1. and 1 and 2 *Ph. & Mar.* c. 13. sect. 5. as were applicable to this country, have been adopted. See 1 *Rev. Code*, c. 81. p. 124. and *Cay's Abridgm.* tit. "CORONER." And for more concerning this office, and duty of coroners, see 2 *Rev. Code*, c. 17. sect. 1. p. 16. *Ibid.* sect. 2. *Ibid.* c. 97. sect. 2, 4. p. 123. *Ibid.* p. 147. *Sess. Acts of 1808*, c. 23. p. 30, 31.

It is observed, upon the statute of 4 *Edw.* 1. commonly called the statute *de officio coronatoris*, that the same being wholly directory, and in affirmance of the common law, doth neither restrain the coroner from any branch of his power, nor excuse him from the execution of any part of his duty, not mentioned in it, which was incident to his office before. *Haw. B. 2. c. 9. sect. 21.*

*I. His power and duty as a judicial officer. II. His power and duty in other matters. III. His fees. IV. Precedents.*

# I. HIS POWER AND DUTY AS A JUDICIAL OFFICER.

He ought to execute his office in person, for he is a judicial officer. *Wood. Inst. B. 1. c. 7. sect. 3. p. 83.*

By *Holt, C J*, the coroner need not go, *ex officio*, to take the inquest, but ought to be sent for, and that when the body is fresh; and to bury the body before, or without sending for the coroner, is a misdemeanor. 1 *Salk.* 377.

The judicial office of a coroner being confined to the taking of inquisitions, on the death of persons who come to a violent or unnatural death, and that upon view of the body alone, it is a matter punishable by amercement to let a body lie till putrefaction, without giving him notice. *Wood, B. 4. c. 1. p. 491. Summ. 170. 2 Hale 57.*

If a prisoner in jail dies a natural death, yet regularly the jailor ought to send for the coroner to inquire, because it may be possibly presumed, that the prisoner died by the ill usage of the jailor. 2 *Hale 57.*

For if a prisoner, by the ill usage of the jailor, comes to an untimely death, it is murder in the jailor, and the law implies malice, in respect of the cruelty. And this is the cause (says lord *Coke*) that if any man dieth in prison, the coroner ought to sit upon his body, to the end it may be inquired of, whether he came to his death by the duress of the jailor, or otherwise: and this sitting of the coroner continueth to this day. 3 *Inst. 52.*

And this inquest upon prisoners ought to consist of a party jury, that is, six of the prisoners (if so many there be) and six who are not prisoners. *Umfreville's Coron. 212.*

A coroner may lawfully, within convenient time, as the space of fourteen days after the death, take up a dead body out of the grave in order to view it, not only for the taking of an inquest, where none hath been taken before; but also for taking of a good one, where an insufficient one hath been taken before. *Haw. B. 2. c. 9. sect. 23.*

So, he may dig up the body, if the first inquisition be quashed. (*Str.* 533.) But not without leave of the court. (*Ibid.* 167.) And the justices will exercise their discretion, according to the length of time the body has laid, and the circumstances of the case. *Salk. 377. Str.* 22.

If there is danger of infection from digging up the body, or if the body is drowned and cannot be found, or if it has lain so long before

the coroner is called in to take the inquest, that no assistance can be had from the view, he ought not to proceed. In such cases the inquiry may be by witnesses of the felony, by justices of the peace, justices of oyer and terminer, or in a court, by presentment of the grand jury. See *Wood. Inst.* 491. *Haw. B. 2. c. 9. sect. 23.* 2 *Hale* 59.

Where the body had been buried five years, and the skull was dug up, which the coroner assured the jury was the skull of the deceased, and the inquest was taken upon that, the court refused to file the inquisition. (*Str.* 22.) So, where it had been buried seven months. 1 *Salk.* 377.

It is not necessary that the inquisition should be taken in the very same place where the body was viewed; for it hath been resolved, that an inquisition taken at D. on the view of a body lying dead at L. may be good. *Haw. B. 2. c. 9. sect. 25.*

A coroner hath no power, either by common law or statute, to inquire of any accessories *after* the fact, to a felony; but of accessories, *before* he hath such power. *Ibid.* sect. 26.

If the coroner omits to take an inquisition upon an untimely death, it may be done by justices, &c. but it must be done openly, and if it be done secretly, it may be quashed. 1 *Burr.* 17.

For mismanagement in the coroner, &c. the filing of the inquisition may be stopped, or the coroner may be ordered to attend, and amend his inquisition. *Wood. Inst.* 492.

If he hath been guilty of corruption or bribery, in taking the inquisition, a *melius inquirendum* may be awarded to special commissioners to take a new one, who shall proceed on the testimony of witnesses, not on view of the body. If the inquisition is good, he that is suspected to have committed the felony may be tried upon the inquisition, as well as upon an indictment. *Wood, Inst.* 492.

If the constables make not a return, or the jurors returned appear not, their defaults are to be returned to the coroner: and the constables or jurors in default shall be amerced by the court having cognizance of the proceedings. 2 *Hale* 59.

The jury appearing, is to be sworn and charged by the coroner to inquire, upon view of the body, how the party came by his death. 2 *Hale* 60.

The opinion formerly held, that a coroner's inquest was not traversable, is now generally exploded. 1 *Bac. Abr. Coron. D.* 1 *Burr.* 19.

## II. HIS POWER AND DUTY IN OTHER MATTERS.

The *ministerial* power of a coroner is exercised, when process is directed to him, by reason of a *just exception* to the sheriff of a county, or sergeant of a corporation, as if the sheriff be a party, &c. *Wood, Inst.* 83.

The coroner, in such cases, stands precisely in the situation of the sheriff or sergeant, as to his power and duty in executing the process, and liability for neglect. 1 *Rev. Code.* p. 126. sect. 21, 22.

He is also bound to be present, in the county court, to pronounce judgment of outlawry, after *quinto exactus* at the fifth court, if the defendant appears not. *Wood, B. 4. c. 1.*

## III. HIS FEES.

	Dolls.	Cts.
For taking an inquisition on a dead body (to be paid out of the estate of the deceased) if the same be sufficient, if not by the county.	2	80
For all other business done by him, as are allowed the sheriff for the same services.	See 1 Rev. Code 219.	

## IV. PRECEDENTS.

*Precept to summon a jury.*

county to wit.

To the sheriff of            county (or, to the constable of            county.)

These are, in the name of the commonwealth, to require you, immediately upon sight hereof, to summon 24\* of the most intelligent and respectable freeholders of this county, to appear before me A C, a coroner of the county aforesaid, on the            day of            at the house of            (or the place where the body lies) in the said county, then and there to inquire of, do, and execute all such things, as on behalf of the commonwealth shall be lawfully given them in charge, touching the death of B D. And be you then there to certify what you shall have done in the premises, and further to do and execute what, in behalf of the commonwealth, shall be then and there enjoined you. Given under my hand and seal, &c.

The jury appearing at the appointed time and place, and the body upon view before them, the officer is to make return of his warrant, and call the jury, to the number of twelve, to answer; one of whom the coroner shall appoint the foreman, and swear in the following words:

*Foreman's Oath.*

You shall diligently inquire, and true presentment make, on behalf of the commonwealth, how, and in what manner A D (or a person unknown, as the case is) here lying dead, came by his death; and of such other matters relating to the same as shall be required of you; according to your evidence. So help you God.

*The rest of the jury.*

Such oath as            the foreman of this inquest, hath taken on his part, you, and every of you, shall well and truly observe, and keep on your parts respectively. So help you God.

The objects of the jury's consideration may be found in the above recited act; to these the coroner must direct their attention, and when

\* The act of Assembly (1 Rev. Code, p. 125, sect. 6) directs, \* at least twelve; but I have inserted twenty-four, which is the usual number returned in inquisitions, though twelve only are sworn. See 2 Hild's H. C. L. p. 137.



they have heard the testimony, the inquisition must be drawn up on a paper indented agreeable to the fact, to which the coroner and each of the jurors must put their hands and seals.

The witnesses are then to be called and sworn.

### *Oath of a witness.*

The evidence which you shall give to this inquest, on behalf of the commonwealth, touching the death of A D, shall be the truth, the whole truth, and nothing but the truth. So help you God.

### *Inquisition of murder.*

to wit.

Inquisition indented, taken at \_\_\_\_\_ in the county aforesaid, the  
 day of \_\_\_\_\_ in the year \_\_\_\_\_ before me \_\_\_\_\_ one of the co-  
 roners of the commonwealth for the county aforesaid, upon the view  
 of the body of A D, late of, &c. then and there lying dead, and upon the  
 oaths of A B C D, &c. good and lawful men of the county aforesaid,  
 who, being sworn, and charged to inquire, on the part of the said com-  
 monwealth, when, where, how, and after what manner, the said A D  
 came to his death, do say, upon their oath, that one \_\_\_\_\_ gentleman,  
 late of the parish of \_\_\_\_\_ in the county of \_\_\_\_\_ not having God be-  
 fore his eyes, but being moved and seduced by the instigation of the  
 devil, on the \_\_\_\_\_ day of \_\_\_\_\_ in the year \_\_\_\_\_ aforesaid, with  
 force and arms, at \_\_\_\_\_ in the county aforesaid, in and upon the  
 aforesaid A D, then and there being in the peace of God, and of the  
 said commonwealth, feloniously, voluntarily, and of his malice fore-  
 thought, made an assault; and that the aforesaid \_\_\_\_\_ then and there,  
 with a certain sword made of iron and steel, of the value of five shil-  
 lings, which he, the said \_\_\_\_\_ then and there held in his right hand,  
 the aforesaid A D, in and upon the left part of the belly of the said  
 A D, a little above the navel of the said A D, then and there violently,  
 feloniously, voluntarily, and of his malice forethought, struck and  
 pierced, and gave to the said A D, then and there, with the sword  
 aforesaid, in and upon the aforesaid left part of the belly of the said  
 A D, a little above the navel of the said A D, one mortal wound, of  
 the breadth of half an inch, and of the depth of three inches, of which  
 said mortal wound the aforesaid A D then and there instantly died,  
 and so the said \_\_\_\_\_ then and there feloniously killed and murdered  
 the said A D, against the peace and dignity of the commonwealth; and  
 the said jurors further say, upon their oath aforesaid, that \_\_\_\_\_ of, &c.  
 and \_\_\_\_\_ of, &c. were feloniously present, with drawn swords, at the  
 time of the felony and murder aforesaid, in form aforesaid committed,  
 that is to say, on the \_\_\_\_\_ day of \_\_\_\_\_ in the year \_\_\_\_\_ aforesaid,  
 at \_\_\_\_\_ aforesaid, in the county aforesaid, then and there comforting,  
 abetting, and aiding the said \_\_\_\_\_ to do and commit the felony and  
 murder aforesaid, in manner aforesaid, against the peace and dignity  
 of the commonwealth; and moreover, the jurors aforesaid, upon their  
 oath aforesaid, do say, that the said \_\_\_\_\_ had not, nor any of them  
 had, nor as yet have or hath, any goods or chattels, lands or tenements,  
 within the county aforesaid, or elsewhere, to the knowledge of the said

jurors (or, and the jurors aforesaid, upon their oath aforesaid, do say, that the said at the time of doing and committing of the felony and murder aforesaid, had goods and chattels, contained in the inventory to this inquisition annexed) in witness whereof, as well the aforesaid coroner, as the jurors aforesaid, have to this inquisition put their seals, on the day and year aforesaid, and at the place aforesaid.

A. B.

C. D.

A. C. coroner.

E. F. &c. jurors.

*Where one drowns himself.*

As above, to oath——do say, that the said A D, not having God before his eyes, but being seduced and moved by the instigation of the devil, at aforesaid, in the county aforesaid, then and there being alone, in a common river there called himself voluntarily and feloniously drowned; and so the jurors aforesaid, upon their oath aforesaid, say, that the aforesaid A D, in manner and form aforesaid, then and there himself, voluntarily and feloniously, as a felon of himself, killed and murdered, against the peace, &c.

*Where one dies a natural death.*

——that the said A D, on the day of in the year aforesaid, at the parish and in the county aforesaid, to wit, at was found dead; that he had no marks of violence appearing on his body, and died by the visitation of God, in a natural way, and not otherwise. In witness, &c.

*Where the murderer is unknown.*

——that a certain person, unknown, did kill and murder the said &c. and add——and the said jurors, upon their oath aforesaid, farther say, that the said person unknown, after he had committed the said felony and murder, in manner aforesaid, did fly away, against the peace, &c.

*Where one hangs himself.*

as above, to——not having God before his eyes, but being seduced and moved by the instigation of the devil, at aforesaid, in a certain wood, at aforesaid, standing and being, the said A D being then and there alone, with a certain beempen cord, of the value of three pence, which he then and there had and held in his hands, and one end thereof then and there put about his neck; and the other end thereof tied about a bough of a certain tree, himself then and there, with the cord aforesaid, voluntarily and feloniously, and of his malice aforethought, hanged and suffocated; and so the jurors aforesaid, upon their oath aforesaid, say, that the said A D, then and there, in manner and form aforesaid, as a felon of himself, feloniously, voluntarily, and

of his malice aforethought, himself killed, strangled and murdered, against the peace. &c.

*An inquisition on one for cutting his throat.*

—by the instigation of the devil, at                   aforesaid, in the county aforesaid, in and upon himself, then and there being in the peace of God, and of the said commonwealth, feloniously, voluntarily, and of his malice forethought, made an assault; and that the aforesaid A D, then and there, with a certain razor, of the value of one penny, which he, the said A D, then and there held in his right hand, himself, upon his throat, then and there feloniously, voluntarily, and of his malice forethought, did strike, and gave to himself, then and there, with the razor aforesaid, upon his throat aforesaid, one mortal wound, of the breadth of           inches, and the depth of           inches, of which said mortal wound the said A D, at           aforesaid, in the county aforesaid, languished, and languishing lived, from the said           day of           in the year aforesaid, to the           day of           and that the said A D, on the           day of           aforesaid, in the           year aforesaid, in the county aforesaid, of that mortal wound died; and so the jurors aforesaid, &c.

*For killing another in his own defence.*

—upon their oath say, that A K, late of           gentleman, at           aforesaid, in the said county, on the           day of           in the           year of           in the peace of God and of the commonwealth then being, A M, late of           in the county of           at the house of           in the afternoon of the same day, did come, and upon him the said A K, then and there, of his malice forethought, did make an assault, and him the said A K did then and there endeavour to beat and kill, by continuing the assault aforesaid, from the house of one W H, in           aforesaid, to a certain place called           in the county aforesaid; and the said A K, seeing that the said A M was so maliciously disposed, to a certain           in the said place, did flee, and from thence, for fear of death, could not escape, and so the said A K, himself, in preservation of his life, against the said A M, continued to defend, and in his own defence him the said A M, upon the right part of the breast of him the said A M, with a certain           of the price of one shilling, which he, the said A K, then and there held in his right hand, did strike, then and there giving to the said A M, one mortal wound, of the breadth of           inches, and of the depth of           inches, of which said mortal wound the said A M, at           aforesaid, in the county aforesaid, languished, and languishing lived, from the said           day of           to the           day of           from thence next ensuing, and that the said A M, on the said           day of           in the           year aforesaid, at           aforesaid, in the said county, of that mortal wound died, and so the said A K did then and there kill him, the said A M, in his own defence.

*Where the death was occasioned by chance-medley.*

—that A B, late of the parish aforesaid, in the county aforesaid, labourer, on the       day of       in the year aforesaid, at the parish and in the county aforesaid, a certain gun of the value of eight shillings, then and there charged with gun powder and a leaden bullet, which he the said A B then and there had and held in both his hands, then and there casually, and by misfortune, and against the will of him the said A B, discharged and shot off; and that the said A B, with the leaden bullet aforesaid, then and there discharged and shot out of the said gun, by the force of the gun powder aforesaid, him the said C D, in and upon the left breast of him the said C D, casually, by misfortune, and against the will of him the said A B, did then and there strike and penetrate, giving unto him the said C D, then and there, with the bullet aforesaid, out of the gun aforesaid, so as aforesaid shot off and discharged by the force of the said gun powder, in and upon the said left breast of him the said C D, one mortal wound, of the breadth of one inch, and the depth of three inches; of which said mortal wound he the said C D then and there instantly died; and so the jurors aforesaid, upon their oath aforesaid, do say, that the said A B, him the said C D, in manner and by means aforesaid, casually, and by misfortune, and against the will of him the said A B, did kill and slay; but what goods or chattels the said A B had, at the time of such killing and slaying by misfortune, as aforesaid, the jurors know not. In witness, &c.

*Indictment against a coroner for refusing to take an inquisition.*

The jurors for, &c. upon their oath present, that on the       day of       in the year       one C D, at       in the county of       was drowned and suffocated in a certain pond, and of that drowning and suffocating she, the said C D, then and there instantly died; and that the body of the said C D, at       aforesaid, in the county aforesaid, lay dead, of which one W C, late of       in the county aforesaid, gentleman, afterwards, to wit, on the said       day of       in the year aforesaid, then being one of the coroners of the commonwealth for the county aforesaid, at       aforesaid, had notice: nevertheless, the said W C, the duty of his office in that behalf not regarding, afterwards, to wit, on the said       day of       in the year aforesaid, at       aforesaid, in the county aforesaid, to execute his office of and concerning the premises. and to take inquisition for the commonwealth, according to the laws and customs of this commonwealth, concerning the death of the said C D. unlawfully, obstinately, and contemptuously, did neglect and refuse; and that the said W C no inquisition in that behalf as yet hath taken, to the great hindrance of justice, in contempt of the laws of this commonwealth, and against the peace and dignity of the commonwealth.

## COUNTERFEITING.

"EVERY person who shall be convicted of having falsely forged and counterfeited any gold or silver coin, which now is, or hereafter shall be passing or in circulation within this state, or of having falsely uttered, paid or tendered in payment, any such counterfeit and forged coin, knowing the same to be forged and counterfeit, or having aided, abetted, or commanded the perpetration of either of the said crimes; or shall be concerned in printing, signing, or passing any counterfeit notes of the bank of Alexandria, or the United States, knowing them to be such, or altering any genuine notes of either of the said banks, shall be sentenced to undergo a confinement in the jail and penitentiary house, not less than *four* nor more than *fifteen* years." 1 *Rev. Code*, p. 356. sect. 9.

"If any person shall falsely make, forge or counterfeit, or cause or procure to be falsely made, forged or counterfeited, or willingly act or assist in the false making, forging or counterfeiting, any bill or note of the bank of Virginia, with intention to defraud either the corporation of the president, directors and company of the bank of Virginia, or any person whatsoever; or shall pass or tender, or offer to pass or exchange, or shall cause or procure to be passed or exchanged, any such bill or note of the bank of Virginia, knowing the same to be false, forged or counterfeited," every such person, on conviction, shall be confined in the penitentiary, for a period not less than *ten* nor more than *twenty* years. 2 *Rev. Code*, p. 80, sect. 5.

In prosecutions under this act, the president, cashier, other officers and stockholders are competent witnesses. *Ibid.* sect. 6.

For fraudulently obtaining, or assisting to obtain, from the bank of Virginia, or any of its branches, any money or notes, by means of a forged or counterfeit check or order, the punishment is imprisonment in the penitentiary, not less than *two* nor more than *ten* years. 2 *Rev. Code*, p. 118.

To forge or counterfeit, or aid or assist in forging or counterfeiting, or to keep or conceal, or aid in keeping or concealing any instrument for the purpose of forging or counterfeiting the seal of the Bank of Virginia, subjects the offender to a confinement in the penitentiary, for a period not less than *five* nor more than *fifteen* years. *Ibid.* sect. 2.

✍ For more relating to counterfeits, see CHEATS, COIN, and FORGERY.



*Warrant, for passing counterfeit notes.*

to wit :

Whereas A I, of                      hath this day made oath before me, J P,  
 a justice of the peace for the county of                      that B O, of  
 did, on the                      day of                      last past, at                      in the said  
 county, feloniously, and fraudulently, pass in payment to the said  
 A I, a certain note, purporting to be a note of the bank of Virginia,  
 for                      dollars, he, the said B O, knowing the same to be false,  
 forged, and counterfeited. These are therefore, to require you to  
 apprehend the said B O, and bring him before me, or some other  
 justice of the peace for the county of                      to be dealt with accord-  
 ing to law. Given under my hand and seal, &c.

If the offender be guilty of any other description of offence, men-  
 tioned under this title, it must be described in the warrant, according  
 to the fact. The *Mittimus*, *Recognizance*, &c. must also state the  
 offence, as it really occurred.

## CRIMINALS.

WHEN any person, not being a slave, shall be charged before a  
 justice with any treason, murder, felony, or other crime or offence  
 whatsoever against this commonwealth, if, in the opinion of the jus-  
 tice, such offence ought to be inquired into in the courts, he shall  
 take the recognizance of all material witnesses, to appear before the  
 court of his county or corporation, to give evidence, and immediately  
 by his warrant commit the person charged to the county or corpora-  
 tion jail; and moreover, shall issue his warrant to the sheriff or ser-  
 geant, requiring him to summon at least eight, if so many there be,  
 of the justices, to meet at their court-house on a certain day, not less  
 than five nor more than ten days after the date thereof, to hold a court  
 of examination; which court, consisting of five members, at least, shall  
 consider, whether the prisoner may be discharged from further prose-  
 cution, or may be tried in the county, or in the district (now circuit\*)  
 court. 2 Rev. Code, ch. 34. sect. 1. p. 36, 37.

If any justice shall commit a person charged with a criminal offence  
 to jail, and neglect or refuse to issue his warrant for summoning a  
 court of examination, or if any sheriff or sergeant shall neglect or re-  
 fuse to obey it, or to return it to the court summoned, with an indorse-

\* In the spring of 1809, a system commenced, by which a superior court of  
 law was established, in each county, called *circuit courts*, which superseded the  
 district court system. The term *circuit* has therefore been substituted for *district*.  
 See 2 Rev. Code, ch. 120. p. 148. and ch. 121. p. 154. amended by act of 1808.  
 ch. 6. p. 9. of Sessions Act.

ment how he has executed it, they shall respectively forfeit one hundred dollars to the commonwealth, recoverable by action of debt or information, in any court of record; and moreover be subject to the action of the party injured, who, on recovery, shall have double costs. *Ibid.*

If the examining court shall be of opinion, that the fact may be tried in the county or corporation, the prisoner shall be bound over to the next grand jury, then to be tried, or, upon refusing to give sufficient bail, shall be remanded to jail, there to remain until such court, or until he shall be bailed. 1 *Rev. Code*, ch. 74. sect. 1. p. 102.

If they shall be of opinion, that the prisoner ought to be tried in the circuit court, they shall take the depositions of witnesses, and bind such as they shall think proper, by recognizance, to appear and give evidence at the trial; and having remanded the prisoner to jail, any two of the justices, by warrant under their hands and seals, shall direct the sheriff, or deputy, or sergeant, to remove the prisoner and commit him to the circuit jail, there to be safely kept till discharged by due course of law; by virtue of which warrant, the officer shall remove the prisoner, as soon as may be, and deliver him, with the warrant, to the keeper of the circuit jail, who shall receive and keep him accordingly. And the same two justices shall empower the officer, by their warrant, to impress so many men, horses, and boats, as well within their county as without, as may be necessary for a guard, and safe conveyance of the prisoner, proceeding therein as directed by law in other cases of imprisonments. 1 *Rev. Code*, ch. 74. sect. 1. p. 102.

If the prisoner be bailable, in the opinion of the court, they shall enter that opinion in their proceedings, as well as the sum of money in which he and his bail shall be bound, and he shall not be removed within twenty days after the examining court, but may be admitted to bail by any justice of the county, within that time, or at any time afterwards, by a judge of the general court. When a prisoner shall be thus admitted to bail by a judge, he shall transmit the recognizance to the clerk of the circuit court, and give a warrant for the deliverance of the prisoner; and the warrant being put into the hands of the officer, in whose custody the prisoner is, he shall thereupon be delivered, if he be detained for no other cause. *Ibid.* sect. 2. p. 102.

Any two judges of the general court, when it is not sitting, may admit to bail a prisoner, when they shall think him bailable, and shall grant a warrant for his deliverance, though the examining court shall have been of a different opinion. *Ibid.* sect. 3 p. 103.

When the examining court shall fail to meet, according to summons, all the recognizances entered into by any person to appear at such court, shall stand obligatory to the next court of the county or corporation, and every such person shall appear accordingly; at which court the examination shall be had. 1 *Rev. Code*, ch. 264. sect. 2. p. 402.

On sending a person for further trial to the circuit court, the clerk of the county must transmit to the clerk of the circuit court, copies of the witnesses' recognizances; and if they fail to appear, the court shall cause their default to be recorded; and writs of *scire facias* may issue thereon, from the circuit court, in the same manner as if they had been entered into in that court; but the witness must be first summon-

ed, to shew cause why the *scire facias* should not be issued. 2 *Rev. Code*, p. 37. sect. 2.

In like manner, copies of the recognizances, of prisoners let to bail, and of their securities, are to be transmitted; and in case of default, a *scire facias* may be issued from the circuit court. *Ibid.*

Copies of recognizances certified and transmitted as above, may be given in evidence, in the same manner as the originals. *Ibid.* p. 38. sect. 2.

Any clerk, failing to perform his duty in the above respects, forfeits one hundred dollars to the commonwealth, recoverable by action of debt, or information in any court of record. *Ibid.*

When a person shall be removed from a county, to be tried in a circuit court, the clerk shall, immediately after the examining court (under the penalty of fifty dollars, 2 *Rev. Code*, p. 38.) transmit to the attorney for the commonwealth, in the circuit court, a copy of the commitment, and of the depositions taken in the cause. 1 *Rev. Code*, p. 105. sect. 20.

A person discharged by a court of examination may plead such discharge, in bar of any future prosecution for the same offence. 2 *Rev. Code*, p. 38. sect. 3.

A court of examination may, for good cause, adjourn, not exceeding three days; except on the application of the prisoner, and then for not more than ten days. 2 *Rev. Code*, p. 38. sect. 4.

A person charged with treason or felony must be tried before a court of examination, before he can be tried in a circuit court. *Ibid.* sect. 5.

After verdict of twelve men, no judgment on any indictment or information, for felony, or any other offence whatsoever, shall be stayed or reversed, for any supposed defect or imperfection in any such indictment or information, so as the felony or offence, therein charged to have been committed or done, be plainly and in substance set forth with convenient certainty, so as to enable the court to give judgment thereon, according to the very right of the cause. *Ibid.* sect. 6.

Offences, the punishment of which does not exceed twelve months confinement in the penitentiary, shall be tried in the court of that county wherein committed: and the examining court, if of opinion that the party ought to be further prosecuted, and that the offence is cognizable in the county court, shall take his recognizance to appear at the next quarterly term, and in case of refusal to give security, the party shall be committed to prison, till discharged by due course of law. (2 *Rev. Code*, p. 24. sect. 3.) After indictment found by the grand jury, the sheriff shall summon twelve men, not members of the grand jury, and qualified as *venire-men*, for the trial of such person. The right of challenge shall be exercised, as in case of felonies. *Ibid.* sect. 4.

Free persons, accused of petit larceny, shall be tried as above; and upon conviction, shall be punished by stripes, not less than ten, nor more than forty, for any one offence; or by confinement in the penitentiary, not less than eighteen months, at the discretion of the jury. 2 *Rev. Code*, p. 70. sect. 4.



Hog-stealers are to be tried and punished as for petit larceny. 2 *Rev. Code*, p. 80. sect. 4.

If treason or felony be committed in a county or corporation, different from that in which the culprit is arrested, he must be conveyed, by warrant of a justice, to the county where the fact was committed; which warrant must be directed to the sheriff or sergeant; who are authorised to impress men, horses, &c. and must deliver the culprit to a magistrate of the county where the fact was committed; who must proceed, as if he were brought before him in the first instance. 1 *Rev. Code*, p. 105.

For other matters relating to criminal prosecutions, see *Index* to 1 *Rev. Code*, the CRIMINALS, and titles ARREST, COMMITMENT, and WARRANT, of this work.

*(A) Warrant to apprehend a criminal.*

county, to wit :

Whereas A I, of                      hath this day given information upon oath, to me, J P, a justice of the peace for the county of                      that on the                      day of                      last past, at the county of                      a certain A O, of                      did, &c. (*here describe the offence.*) These are therefore, in the name of the commonwealth, to require you to apprehend the said A O, and to bring him before me, or some other justice of the peace for the county of                      to answer the premises, and further to be dealt with according to law. Given under my hand and seal, at the county of                      this                      day of                      in the year

Summon A W, B W, &c. as witnesses.

This warrant may be directed to the sheriff or constable, or to any individual by name; for a magistrate has the power of deputing constables to serve warrants, in pleas of the commonwealth.

The justice, before whom the prisoner is brought, is bound immediately to examine into the circumstances of the crime alledged. (4 *Bl. Com.* 296.) But the practice of taking the examination of the prisoner, and of the witnesses, which was directed by stat. 2 and 3 *Ph.* and *Mar.* c. 10. is not pursued in Virginia; but so far as respects the examination of the witnesses, the power has been transferred to the examining courts.

Witnesses may be summoned, either by a postscript annexed to the warrant, as in the above form of a warrant, or by the following.

*(B) Summons for a witness.*

county, to wit :

Whereas oath hath been made before me, J P, a justice of the peace for the county aforesaid, by A I, that the store house of the said A I was lately broken open, and sundry goods stolen thereout (*or other facts, as the case is*) and that he hath good cause to believe that A W is a material witness, to prove by whom the said felony was committed. These are therefore, to require you to cause the said A W forthwith to come before me, to give such evidence as he knows concerning the said offence. Given under my hand and seal, &c.

To                      to execute.

*(C) Recognizance of the witnesses.*

county, to wit :

Memorandum, that upon this                      day of                      in the year  
A W, of                      &c. and B W, of                      &c. came before  
me, J P, a justice of the peace for the county aforesaid, and each of  
them of his proper person acknowledged himself indebted to A G,  
esquire, governor or chief magistrate of the commonwealth of Vir-  
ginia, and his successors, in the sum of                      dollars, to be levied  
severally of each of their goods and chattels, lands and tenements,  
respectively, to the use of the said commonwealth; upon condition,  
that if each of them do personally appear before the commonwealth's  
justices of the peace for the said county of                      on the  
day of                      at a court by them to be held, at the court-house of the  
said county, for the examination of A O, &c. and do then and there,  
on behalf of the said commonwealth, give such evidence as he know-  
eth against the said A O, concerning the matters wherewith he is  
charged, and that neither he, nor either of them, do depart without  
leave of the said court, then this recognizance to be void, else to re-  
main in full force.

If the prosecutor, or a witness, refuse to enter into a recognizance,  
he may in either case be committed. 1 Hale 586.

*(D) Recognizance of the prisoner.*

*(The recognizance may be as in form (A) under title RECOGNIZANCE,  
with the following condition :)*

The condition of the above recognizance is such, that if the above  
bound A O do and shall personally appear before the commonwealth's  
justices of the peace for the county of                      at a court to be held  
on the                      day of                      at the court-house of the said county,  
for the examination of the said A O, touching a certain felony where-  
with he stands charged, in &c. *(here describe the offence)* and shall then  
and there do, and receive, what shall be enjoined by the said court,  
and shall not depart thence without leave of the same, then the above  
recognizance to be void, else to remain in full force and virtue.

☞ This recognizance is not to be taken, except where the pri-  
soner, in the opinion of the magistrate, is bailable: for which, see  
title "BAIL." If the prisoner be not bailable, he must be committed.

*(E) Mittimus.*

county, to wit :

To the sheriff *(or any constable)* of the said county, and to the keeper  
of the jail of the said county.

These are to command you, the said sheriff *(or constable, as the case  
may be)* in the name of the commonwealth, to convey and deliver  
into the custody of the said keeper of the said jail, the body of A O,  
late of &c. charged before me with &c. *(here specify the offence par-  
ticularly, for which the description in the indictment, under the title to  
which the offence belongs, will generally be the best guide.)* And you,

the said jailor, are hereby required to receive the said A O into your jail and custody, and him there safely to keep, till he shall thence be discharged by due course of law. Given under my hand and seal, this       day of       in the year       and in the year of the commonwealth.

*(F) Warrant for summoning a court.*

county, to wit :

To the sheriff of the said county.

Whereas A O, late of &c. was this day committed to the jail of this county, by my warrant, it appearing to me, that the felonious offence wherewith he stands charged ought to be examined into by the county court ; therefore, on behalf of the commonwealth, I require you, that you summon at least eight of the justices of your said county to meet at the court-house, on the       day of       and then and there to hold a court for the examination of the fact, with which the said A O stands charged, and for such other purposes concerning the premises, as is by law required and directed ; and that you have then there this warrant. Given, &c.

To this court the justice is to return the recognizance of the witnesses and prisoner, if bailed.

*(G) Recognizance of bail, where the prisoner is bound over to the next grand jury.*

A O, of &c. labourer, B B, of &c. and C B, of &c. severally acknowledge themselves indebted to A G, esquire, governor or chief magistrate of this commonwealth, and his successors, that is to say, the said A O in       dollars, and the said B B and C B in       dollars each, to be levied of their several and respective lands and tenements, goods and chattels, to the use of the said commonwealth, in case the said A O shall fail to appear personally, at a court to be held for this county, on       (the first day of the next quarterly court) then and there to answer an indictment to be preferred to the grand jury against the said A O, for *petit larceny* (or other offences, as the case is whereof he stands charged ; or in case, so appearing, he shall depart without leave of the court.

*(H) Recognizance of bail, where the prisoner is sent for further trial to the circuit court, but is, in the opinion of the court of examination, bailable.*

county, to wit :

Be it remembered, that on the       day of       in the year       A O, of       labourer, A B, of       yeoman, and B B, of       yeoman, came before me, J P, one of the commonwealth's justices of the peace for the county of       aforesaid, and severally acknowledged themselves to owe, and be indebted to, A G, esquire, governor or chief magistrate of the commonwealth of Virginia, and his successors, that is to say, the said A O in       (the sum must

*exactly correspond with that directed by the court of examination*) and the said A B and B B                      dollars each to be respectively levied of their lands and tenements, goods and chattels; yet upon this condition, that if the said A O shall make default in performance of the condition underwritten.

The condition of this recognizance is such, that if the above bound A O shall personally appear before the judges of the superior court of law, appointed to be holden for this county, on the first day of the next term, then and there to answer to the said commonwealth, for and concerning (*here recite the offence*) wherewith the said A O stood charged before the commonwealth's justices of the peace for the said county of                      at a court held for the examination of the said A O, on the                      day of                      last past, who were of opinion that the said A O ought to be tried for the said offence in the circuit court, and that he was by law bailable for the same, as appears to me of record; and if the said A O shall also then and there do and receive what shall by the said court be ordered and adjudged, and shall not depart thence without the leave of the said court, then this recognizance shall be void, else shall remain in full force.

Acknowledged before me.

*(I) Recognizance of Bail taken before a judge of the general court, after the offender is committed to the circuit jail.*

Be it remembered, that on the                      day of                      in the year                      and in the                      year of the commonwealth, A B, of                      and B B, of                      personally came before me J J, one of the judges of the general court, and took in bail until the next circuit court appointed by law to be holden at                      one A O, of                      labourer, committed and now detained in the jail of the said circuit court, by virtue of a warrant under the hands and seals of J P and J P, two of the commonwealth's justices of the peace for the county of                      for the felonious, &c. (*here describe the offence*) for which said offence, at a court held by the commonwealth's justices of the peace for the said county of                      on the                      day of                      last past, for the examination of the said A O, it was the opinion of the said court, that the said A O ought to be tried in the circuit court, and that he was by law bailable for the same, as appears to me of record; and the said A B and B B took upon themselves, each severally, under the penalty of                      dollars lawful money of Virginia, of the goods and chattels, lands and tenements, of them and each of them, to the use of the commonwealth, to be levied, if the said A O shall not personally appear at the next circuit court appointed by law to be holden at                      to answer concerning the felony aforesaid, according to the laws of this commonwealth.

Taken and acknowledged before }  
me, the day and year first above }  
written.

*(J) Warrant for the deliverance of a prisoner bailable by law, but detained in the circuit jail for want of bail.*

J J, one of the judges of the general court, to the keeper of the jail of the superior court of law, of            county, greeting. Forasmuch as A O, late of the county of            labourer, hath before me found sufficient sureties to appear before the judges of the superior court of law of            on the first day of the next succeeding court, to answer such things as shall then and there, on the behalf of the commonwealth, be objected against him, and namely to the felonious, &c. (*here describe the offence*) for which offence the said A O was committed to the said jail, by warrant under the hands and seals of J P and J P, two of the justices of the peace for the county of            (the court held for the examination of the fact, with which the said A O stood charged, on the            day of            last past, at the said county of            being of opinion that the said A O ought to be tried for the said offence, in the said superior court, and that he was by law bailable for the same, as appears to me of record.) You are hereby commanded, in the name of the commonwealth, that if the said A O do remain in your said jail, for the said cause, and for none other, then you forbear to detain him any longer, but that you deliver him thence, and suffer him to go at large, and that upon the pain that will thereon ensue. Given under my hand and seal, &c.

☞ The form of the recognizance, and warrant for discharge of a prisoner, by two justices, may pursue the two last, with such variations as will readily occur to judges by whom they are to be executed.

*(K) Mittimus to the circuit jail.*

To the sheriff of the county of            and to the keeper of the jail of the superior court of law of            county.  
county, to wit.

Whereas, at a court held by the commonwealth's justices of the peace for the said county of            on the            day of            last past, for the examination of A O, late of            &c. then a prisoner in the jail of the said county, charged with the felonious, &c. (*here recite the offence*) it was the opinion of the said court that the said A O, for the said felony, ought to be tried in the superior court of law of the said county, and thereupon he was remanded to the jail of the county aforesaid, as appears to us of record: We, J P and J P, two of the justices of the peace for the said county of            hereby require and command you, the said sheriff, on behalf of the commonwealth, that you forthwith remove the body of the said A O from your jail aforesaid, and him safely convey to the public jail of the said superior court of law of            county, and there deliver him to the keeper of the said public jail, together with this precept. And we authorise and empower you, the said sheriff, as well within your county, as in all other counties through which you pass with your said prisoner, legally to impress such and so many men, horses, and boats, as shall be necessary for the guard and safe conveyance of your said prisoner to the



jail aforesaid. And we charge and command you, the keeper of the said public jail to receive the said A O into your jail and custody, and him there safely to keep, until he shall be thence discharged by due course of law. Given under our hands and seals, at        in the county of        aforesaid, this        day of        in the year        and in the        year of the commonwealth.

*The sheriff delivering the prisoner to the jailor should take a receipt for him in the following form :*

‘Received into the public jail the body of A O, late of, &c committed for felony, by warrant of        and        justices of the peace for the county of        and delivered into my custody by the sheriff of the same county.’

A K, keeper P J.

☞ In consequence of the change of the judiciary system, by which a superior court of law is to be held in each county, there will seldom be occasion to use the above precept, the jail of the county being the jail of the superior court of law.

*(L) Form of the valuation made by two or more freeholders.*

We, A F and B F, two freeholders of the county of        having been appointed by the sheriff of the county of        to value a horse this day impressed by the said sheriff, from A M, of        for the purpose of conveying a criminal from the jail of the said county of        to the jail of the circuit court, and having been first duly sworn to appraise the said horse, do value him at        dollars. Certified this        day of        &c.

A. F.  
B. F.

*(M) Sheriff's Certificate.*

‘I do hereby certify that I had a horse, the property of A M, of the county of        days, for the purpose of conveying a criminal, viz. A O, from the jail of the county of        to the jail of the circuit court. Certified this        day of        A. S.’

*(N) Warrant to convey a culprit from the county in which he is arrested, to that in which the fact was committed.*

county, to wit.

*To the sheriff of the said county.*

Whereas A O, late of        labourer, hath this day been arrested, and brought before me J P, one of the commonwealth's justices of the peace, for the said county of        on suspicion of, &c. (*here recite the offence*) (or charged on oath by A J, of        with &c. as the case may be) and it appearing to me that the offence, wherewith the said A O stands charged, was committed in the county of        . These are therefore to command and require you, in the name of the commonwealth, forthwith to convey the said A O to the said county, and there

deliver him to some justice of the peace for the said county, to be dealt with as the law directs. Given under my hand and seal, this day of        in the year, &c.

(O) *Receipt of the Magistrate.*

county, to wit.

This is to certify that A S, sheriff of the county of        did this day bring before me J P, a justice of the peace for the county of a certain A O, late of        &c. arrested in the said county of on suspicion of felony, and by warrant from J P, one of the justices of the peace for the said county, directed to be conveyed to some justice of the peace in this county, it appearing to the said J P, that the fact, wherewith the said A O was charged was committed in this county. And I do also certify, that the distance, in my opinion, which the said A O was conveyed by the said A S, is        miles. Given, &c.

(P) *Order of justices to impress a guard for a jail. (See 1 Rev. Code, p. 76. sect. 17.)*

county, to wit.

Whereas J R, keeper of the circuit jail at F, hath given information unto us, J P, and K P, two of the justices of the peace for the county of        aforesaid, that the said jail is insufficient for the safe-keeping of the prisoner (or prisoners) now committed thereto, and hath made application to us for our warrant to authorise the impressing of a sufficient guard for that purpose. These are, therefore, to authorise the said J R to impress such a number of guards, as will be sufficient to keep safely the prisoner (or prisoners) now committed to his care; and for so doing this shall be his warrant. Given, &c.

For proceedings on the trial of slaves, see titles SLAVES and CLERGY.

CURSING, See SWEARING.

DEBT, (*for sums under twenty dollars*) See WARRANTS.

DEBTORS, *absconding*, See ATTACHMENT.

DEBTORS INSOLVENT, (See INSOLVENTS.)

DECEIT, See CHEATS.

## DEODAND.

DEODAND (from *deodandum*, i. e. *given to God*) is when any moveable thing inanimate, or beast animate, doth move to, or cause the untimely death of any reasonable creature, by mischance, without the will or fault of himself, or of any other person. 3 *Inst.* 57. 1 *Bl. Com.* 300.

As this subject existed under the common law; it might be improper to pass it over in silence; though it seems to be virtually abolished by the ninth article of the constitution of this state. I shall, however, only observe, that it originated in the pious, though ridiculous, superstition of our European ancestors, who, while they believed that remission of sins might be obtained for the souls of the deceased, appropriated the instrument which occasioned an untimely death to the purchase of masses, for the use of the soul, thus prematurely hurried out of existence. But this *deodand* being forfeited to the king's almoner, to be applied by him to those pious uses, it was soon considered as one of the casual revenues of the crown, and by the king granted, as other franchises, to lords of manors. Thus is this infamous practice continued to this day in England, by the king and those lords to whom the right of deodands was granted, as a mean to rob the widow and orphan of the deceased person's property, when the reason for doing it had long ceased. The juries, however, of late have greatly discountenanced this business, by finding some very inconsiderable part of the property (as the wheel of a waggon, &c.) the cause of the death; and as no forfeiture, in this case, can accrue, till the coroner's inquest has found that the object occasioned the death, consequently no part is forfeited except that so found.

DISORDERLY-HOUSES, See LEWDNESS.

DISTRESS, See RENTS.

DOORS BREAKING OPEN, See ARREST.

DOWER, See FORFEITURE.

DRIVER, See CATTLE.

DRUNKENNESS, See SWEARING.

DUELLING, See HOMICIDE.

## ELECTIONS.

' Any person, who shall be a candidate for any county or senatorial district, to serve, if elected, in the General Assembly, who shall directly or indirectly give, or agree to give, any elector or pretended elector, money, meat, drink, or other reward, in order to be elected, or who shall treat directly or indirectly, being a candidate for such or any other county, city, borough, or district, upon due proof thereof, to either house, shall be expelled, and disabled to be re-elected during the term of three years: *Provided*, That nothing herein contained shall be so construed as to prevent any candidate from his usual intercourse of friendship with his neighbours, at his own house.' 1 Rev. Code, p. 389.

' Any candidate, or other person in his behalf, who shall directly or indirectly give, or agree to give, any elector or pretended elector, mo-



ney, meat, drink, or other reward, in order to be elected, or for having been elected a representative of this commonwealth in Congress, shall forfeit and pay fifteen hundred dollars for each offence, to be recovered with costs, by action of debt, to the use of any person who will sue for the same.' 1 Rev. Code, p. 57.

EMBRACERY, See MAINTENANCE.

## ESCAPE.

AN escape is, where one that is arrested gaineth his liberty before he is delivered by course of law. *Terms de la ley*. Escapes are of three kinds. 1st. By a person who hath the offender in his custody; this is properly called an *escape*. 2d. Caused by a stranger; this is commonly called a *rescue*. 3d. By the party himself; either without force, which is simply an escape, or with force, which is *prison breaking*. *Rescous* and *prison breaking* are treated of under their respective titles, and this title treats only of escapes properly so called. Concerning which will be shewn,

*I. Of escape by the party himself. II. Escape suffered by a private person. III. Escape suffered by an officer. IV. What is a voluntary, and what a negligent escape. V. Concerning the retaking of a person escaped. VI. Indictment for an escape. VII. Trial and conviction for an escape. VIII. Punishment of an escape. IX. Of escapes in civil cases. X. Escape warrants.*

### I. OF ESCAPE BY THE PARTY HIMSELF.

As all persons are bound to submit themselves to the judgment of the law, and to be ready to be justified by it; whoever in any case refuses to undergo that imprisonment which the law thinks fit to put upon him, and frees himself from it by any artifice, before such time as he is delivered by due course of law, is guilty of a high contempt, punishable with fine and imprisonment. *Haw. B. 2. c. 17. sect. 5.*

But escape committed by the party himself belongs more properly to the title PRISON BREAKING.

### II. ESCAPE SUFFERED BY A PRIVATE PERSON.

It seems to be a good general rule, that wherever any person hath another lawfully in custody, whether upon an arrest made by himself

or by another, he is guilty of an escape, if he suffer him to go at large, before he hath discharged himself of him, by delivering him over to some other, who by law ought to have the custody of him. *Haw. B. 2. c. 20. sect. 1.*

And the law is generally the same in relation to escapes suffered by private persons, as by officers. See *Haw. B. 2. c. 20. and 1 Rev. Code, p. 106. sect. 29.*

### III. ESCAPE SUFFERED BY AN OFFICER.

In order to make an escape, there must be an actual arrest, and therefore, if an officer, having a warrant to arrest a man, see him shut up in a house, and challenge him as his prisoner, but never actually have him in his custody, and the party get free, the officer cannot be charged with an escape. *Haw. B. 2. c. 19. sect. 1.*

And as there must be an actual arrest, such arrest must be also justifiable; for, if it be either for a supposed crime, where no such crime was committed, and the party neither indicted nor appealed, or for such a slight suspicion of an actual crime, and by such an irregular mittimus as will neither justify the arrest or imprisonment, the officer is not guilty of an escape, by suffering the prisoner to go at large. *Ibid. sect. 2.*

And as the imprisonment must be justifiable, so it must be also for a criminal offence. *Ibid. sect. 3.*

Also, if a prisoner be acquitted, and detained only for his fees, it will not be criminal to suffer him to escape, though the judgment were, that he be discharged, paying his fees, so that till they be paid the first imprisonment continued lawful as before; for inasmuch as he is detained, not as a criminal, but only as a debtor, his escape cannot be more criminal than that of any other debtor. Yet, if a person convicted of a crime be condemned to imprisonment for a certain time, and also till he pay his fees, and he escape after such time is elapsed, without paying them, perhaps such escape may be criminal, for that it was part of the punishment that the imprisonment be continued till the fees should be paid; but it seems that this is to be intended where the fees are due to others as well as to the jailor, for otherwise the jailor will be the only sufferer by the escape, and it will be hard to punish him for suffering an injury to himself only, in the non-payment of a debt in his power to release. *Haw. B. 2. c. 19. sect. 4.*

Also, it is an escape in some cases, to suffer a prisoner to have greater liberty, than by the law he ought to have; as to admit a person to bail, who by law ought not to be bailed, but to be kept in close custody. *Ibid. sect. 5.*

So, if a jailor or other officer shall licence his prisoner to go abroad for a time, and to come again; this is an escape, because the prisoner is found out of the bounds of his prison, though the prisoner return again, according as he shall be prescribed. *Dalt. c. 159.*

If the jailor so closely pursues the prisoner who flies from him, that he retakes him, without losing sight of him, the law looks on the prisoner so far in his power all the time, as not to adjudge such a flight to amount at all to an escape; but if the jailor once lose sight of the prisoner, and afterwards retake him, he seems in strictness to be

guilty of an escape. And if he kill him in the pursuit, he is in like manner guilty of an escape, though he never lost sight of him, and could not otherwise take him; because the public justice is not so well satisfied by the killing him in such an extrajudicial manner. *Haw. B. 2. c. 19. sect. 6.*

#### IV. WHAT IS A VOLUNTARY, AND WHAT A NEGLIGENT ESCAPE.

Wherever an officer, who hath the custody of a prisoner, charged with and guilty of a capital offence, doth knowingly give him his liberty, with an intent to save him from his trial or execution, this is a voluntary escape. *Haw. B. 2. c. 19. sect. 10.*

A negligent escape is, when the party arrested or imprisoned doth escape, against the will of him that arrested or imprisoned him, and is not freshly pursued and taken again, before he hath lost the sight of him. *Dalt. c. 159.*

If the constable or other officer shall voluntarily suffer a thief, being in his custody, to go into the water to drown himself, this escape is felony in the constable, and the drowning is felony in the thief. Otherwise, if the thief shall suddenly, without the assent of the constable, kill, hang, or drown himself, this is but a negligent escape in the constable. *Ibid.*

#### V. CONCERNING THE RETAKING OF A PERSON ESCAPED.

If an officer hath arrested a man by virtue of a warrant, and then taketh his promise that he will come again, and so letteth him go; the officer cannot, after arrest, take him again by force of his former warrant, for that this was by the consent of the officer. But if he return, and put himself again under the custody of the officer, it seems that it may be probably argued, that the officer may lawfully detain him, and bring him before the justice in pursuance of the warrant. *Dalt. c. 169. Haw. B. 2. c. 13. sect. 9.*

But if the party arrested had escaped of his own wrong, without the consent of the officer, now, upon fresh suit, the officer may take him again and again, so often as he escapeth, although he were out of view, or that he shall fly into another town or county, and bring him before the justice, upon whose warrant he was first arrested. *Dalt. c. 169.*

And it is said generally, in some books, that an officer, who hath negligently suffered a prisoner to escape, may retake him wherever he finds him, without mentioning any fresh pursuit; and indeed, since the liberty gained by the prisoner is wholly owing to his own wrong, there seems to be no reason he should take any manner of advantage from it. *Haw. B. 2. c. 19. sect. 12.*

And wherever a person is lawfully arrested for any cause, and afterwards escapes, and shelters himself in a house, the doors may be broke open to take him, on refusal of admittance. *Haw. B. 2. c. 14. sect. 9.*

It is perhaps the better opinion, that wherever a prisoner, by the negligence of his keeper, gets so far out of his power, that the keeper

loses sight of him, the keeper is punishable for the escape, notwithstanding he retook him immediately after. And it is clear that he cannot excuse himself from an escape, by killing a prisoner in the pursuit, though he could not possibly retake him, but must in such case be content to submit to such punishment, as his negligence shall appear to deserve. *Haw. B. 2. c. 19. sect. 13.*

#### VI. INDICTMENT FOR AN ESCAPE.

It seems clear that every indictment (A) for an escape, whether negligent or voluntary, must expressly shew, that the prisoner was actually in the defendant's custody for such a crime, and that he went at large. And if for a voluntary escape, that the defendant feloniously and voluntarily suffered him to go at large; and must set forth, not the felony in general, but the particular kind of felony. But it seems questionable, whether such certainty, as to the nature of the crime, be necessary in an indictment for a negligent escape; for that it is not material in this case, whether the person who escaped were guilty or not. *Haw. B. 2. c. 19. sect. 14. Ibid. c. 25. sect. 66.*

#### VII. TRIAL AND CONVICTION FOR AN ESCAPE.

If the prisoner be of record in a court, and the jailor, being called, cannot give an account where he is, that is a conviction of an escape; but seems not a conviction of a voluntary escape; unless the jailor confesseth it. And the jailor may be fined in such a case; but not convicted of felony, without indictment or presentment. 1 *Hale* 603, 599.

And it seems to be clear, that a keeper, who voluntarily suffers another to escape, who was in his custody for felony, cannot be arraigned for such an escape as for felony, until the principal be attainted, for that the felony of the prisoner shall not be tried between the commonwealth and the keeper, because the prisoner is a stranger thereunto, yet he may be indicted and tried for a misprision, before the attainer of the principal offender. *Haw. B. 2. c. 19. sect. 26. 2 Inst. 591, 592.*

#### VIII. PUNISHMENT OF AN ESCAPE.

If a felon escapes before an arrest, it is not punishable in him as felony; but for the flight, he forfeits his goods, when presented. *Summ. 111.*

If a private person arrest a felon, and he escape by force from him, the township shall be amerced, but it seems it excuseth the party, because he cannot raise power to assist him; but if a constable or other officer hath the custody of a prisoner, bringing him to the jail, it seems that a simple escape, by the rescue of the prisoner himself, doth not wholly excuse him, because he may take sufficient strength to his assistance. 1 *Hale* 601.

Wherever a person is found guilty upon an indictment or presentment, of a negligent escape of a criminal actually in his custody, he is punishable by fine and imprisonment, according to the quality of the offence. 1 *Hale* 600, 604. *Haw. B. 2. c. 19. sect. 31.*

And it seems to be the better opinion, that the sheriff is as much liable to answer for a negligent escape suffered by his bailiff, as if he had actually suffered it himself, and that the court may charge the sheriff or bailiff for such an escape; and if a deputy jailor be not sufficient to answer a negligent escape, his principal must answer for him. *Ibid.* sect. 29.

If a prisoner for felony break the jail, this seems to be a negligent escape in the jailor, because there wanted either that due strength in the jail, that should have secured him, or that due vigilance in the jailor or his officers, to have prevented it; and therefore it is lawful for the jailor to hamper them with irons to prevent their escape, for if a jailor might not be punished for this as a negligent escape, they would be careless either to secure their prisoners, or to retake them that escape. 1 *Hale* 601.

It seems to be generally agreed, that a voluntary escape, suffered by an officer, amounts to the same kind of crime, and is punishable in the same degree, as the offence of which the party was guilty, and for which he was in custody, whether it be treason, felony, or trespass. *Haw. B. 2. c. 19. sect. 22.*

But yet a voluntary escape is no felony, if the act done were not felony at the time of the escape made, as in case of a mortal wound given, and the party not dying till after the escape; but the officer may be fined to the value of his goods. *Dalt. c. 159.*

Also, a voluntary escape, suffered by one who wrongfully takes upon him the keeping of a jail, seems to be punishable in the same manner as if he was never so rightfully intitled to such custody; for that the crime is in both cases of the same ill consequence to the public; and there seems to be no reason that a wrongful officer should have greater favour than a rightful, and that for no other reason but because he is a wrongful one. *Haw. B. 2. c. 19. sect. 23.*

But it seemeth to be clear, that no one is punishable as for felony, for the voluntary escape of a felon, but the person who is actually guilty of it; and therefore that the principal jailor is only fineable for a voluntary escape suffered by his deputy; for that no one shall suffer capitally for the crime of another. *Ibid.* sect. 27.

And therefore, although in all civil causes the sheriff is to be responsible, or the jailor at election, yet if the jailor do voluntarily suffer a felon in his custody to escape; this, inasmuch as it reacheth to life, is felony only in the jailor that was immediately trusted with the custody, and not in the sheriff. 1 *Hale* 597.

And whoever *de facto* occupies the office of jailor is liable to answer for an escape; and it is not material whether his title to the office be legal or not. *Haw. B. 2. c. 19. sect. 28.*

The escape must be voluntarily permitted in him that permitted it, which could not be in the high sheriff, though it were such in the jailor, for he was not privy to it and therefore could not do it feloniously; but it was a negligent escape in him, in trusting such a person with the custody of his prisoners that would be false to his trust, and therefore the sheriff shall pay, but not corporally suffer, for the miscarriage of his jailor. 1 *Hale* 597, 598.

But, although the felony for which a man is committed be not within

clergy, yet the person who voluntarily suffers him to escape shall have the benefit of clergy. 1 Hale 599.

## IX. OF ESCAPES IN CIVIL CASES.

The proceedings on escapes, in civil cases, are directed by Virginia laws. 1 Rev. Code, ch. 79. p. 118. which see.

## X. ESCAPE WARRANTS.

### 1. In civil cases.

(Where the defendant was committed on an execution.)

To all sheriffs, mayors, sergeants, bailiffs, and constables, within the commonwealth of Virginia.

to wit :

Complaint being this day made to me, upon oath, by T J, of &c. that J D, who was charged in execution, in the jail of the said county (or within the bounds of the jail of this county) at the suit of A C, &c. (here mention the several executions particularly) did, on or about the day of last past, escape out of the said jail (or prison bounds) and is now going at large. These are therefore, in the name of the commonwealth, to require you, and every of you, in your respective counties, cities, towns, and precincts, to seize and retake the said J D, and him, so retaken, to commit to the prison where debtors are usually kept, in the county where he is so retaken, and deliver him to the keeper thereof, together with this warrant ; hereby commanding and requiring the said keeper to receive the said J D, and him safely to keep in the said jail, without bail or mainprize, until satisfaction be made to the said A C, for the said debt and costs, or until he be thence delivered by due course of law : and to return this warrant to the court of the said county of pursuant to the act of the General Assembly in that case made and provided. Given under my hand and seal, &c.

(ON MESNE PROCESS.)

If the escape was upon mesne process, then say :

Complaint, &c. by J S, under sheriff of the said county, that J D, who was committed to the jail of the said county, for want of bail, at the suit of A C, &c. (here recite the cause of action) did, on or about the day of last past, make his escape out of the jail of the said county, and is now going at large. These are, &c. (as in the other precedent to jail ; and then add) until a certificate, under the hand of the clerk of the court of the said county, that the said J D hath given bail in the said suit, be delivered to you, and to return, &c. as before.

This warrant may be executed at any time or place.

### 2. Escape warrant against a criminal.

to wit :

J P, one of the commonwealth's justices of the peace for the said county, to all sheriffs, mayors, bailiffs, constables, and headboroughs, within the commonwealth of Virginia.

Whereas complaint is made to me this day, upon the oath of A W, that A O, labourer, who was lately committed to the jail of the said county of \_\_\_\_\_ by warrant from J P, a justice of the peace of the said county, on suspicion of felony, did, on the \_\_\_\_\_ day of \_\_\_\_\_ last past, forcibly escape from the said jail, and is now going at large. These are therefore, in the name of the commonwealth, to require you, and every of you, in your respective counties, cities, towns, and precincts, to make diligent search, by way of hue and cry, for the said A O, and him having found, to sieze and retake, and safely convey, or cause him to be safely conveyed, to the jail of the said county of \_\_\_\_\_ there to be kept until he shall be thence discharged by due course of law. Given under my hand and seal, &c.

*(A) Indictment against a constable for an escape.*

county, to wit :

The jurors, &c. upon their oaths do present, that on the \_\_\_\_\_ day of \_\_\_\_\_ in the year \_\_\_\_\_ and in the \_\_\_\_\_ year of the commonwealth, at \_\_\_\_\_ in the county aforesaid, one A I, of \_\_\_\_\_ came before J P, then and yet one of the justices of the commonwealth, assigned to keep the peace in the said county ; and the said A I did then and there upon his oath, before the same justice, charge, accuse, and give information against one A O, of \_\_\_\_\_ aforesaid, in the county aforesaid, yeoman, for a certain felony, in feloniously, &c. (*here describe the offence*) at \_\_\_\_\_ in the said county. Whereupon the said J P, the justice aforesaid, did then and there, to wit, at \_\_\_\_\_ aforesaid, in the county aforesaid, make a certain warrant, under his hand and seal, in due form of law, directed to the constable of \_\_\_\_\_ aforesaid, in the county aforesaid, thereby commanding him to bring the body of the said A O before the said J P, to answer to such matters and things as should be alledged against him, touching the said felony. Which said warrant afterwards, to wit, on the same day and year above mentioned, at \_\_\_\_\_ aforesaid, in the county aforesaid, was delivered to one A C, then being constable of \_\_\_\_\_ in the said county, in due form of law, to be executed ; by virtue of which said warrant, the said A C, afterward, to wit, on the said \_\_\_\_\_ day of \_\_\_\_\_ in the year aforesaid, at \_\_\_\_\_ aforesaid, in the said county, did take and arrest the body of the said A O, and him the said A O in his custody, for the cause aforesaid, had. Nevertheless, the said A C, of \_\_\_\_\_ aforesaid, in the county aforesaid, yeoman, afterwards, to wit, on the said \_\_\_\_\_ day of \_\_\_\_\_ in the year aforesaid, the duty of his office in that part not regarding, at \_\_\_\_\_ aforesaid, in the county aforesaid, unlawfully and negligently did permit the said A O to escape. and go at large, out of the custody of him the said A C. to the great hindrance of justice, in contempt of the laws of this commonwealth, and against the peace and dignity of the commonwealth.

## ESTRAYS.

*I. What shall be deemed estrays. II. The mode of proceeding on taking up estrays. III. Adjudications on this subject. IV. Precedents.*

### I. WHAT SHALL BE DEEMED ESTRAYS.

ESTRAYS are such valuable animals as have abandoned the pastures and lands of their proprietors, and are found wandering on the lands of others, where the owner is not known.

Any beasts may be estrays, that are by nature tame, or reclaimable, and in which there is a valuable property, as sheep, oxen, swine, and horses, which we in general call cattle. 1 *Bl. Com.* 298.

But animals, upon which the law sets no value, as a dog or cat, and animals, *feræ nature*, as a bear, or wolf, cannot be considered as estrays. *Ibid.*

### II. THE MODE OF PROCEEDING ON TAKING UP ESTRAYS.

Any person, by himself or agent, may take up an estray on his own land, and shall forthwith give information thereof to a justice of the county, who shall issue his warrant to three disinterested freeholders of the neighbourhood, commanding them, having been first duly sworn, to view and appraise such estray, and certify the valuation under their hands, together with a particular description of the kind, marks, brand, stature, colour, and age; which certificate the justice shall transmit to the clerk of the county within twenty days, who shall enter it in a book to be kept for that purpose, and receive ten pounds of tobacco, to be paid down by the taker-up. 1 *Rev. Code*, p. 18. sect. 1.

2. The clerk shall cause a copy of every such certificate to be publicly affixed at the door of his court-house, on two several court days next after he receive the same, for which, and a certificate thereof, he shall likewise receive ten pounds of tobacco.

3. If the valuation is under twenty shillings, and no owner appears, till notice has been twice published as aforesaid, the property is then vested in the owner of the land on which the estray was taken; if it exceeds twenty shillings, the owner shall, within three months after the appraisement, cause a copy of the certificate and notice to be published in any newspaper, printed nearest where the estray was taken up, three times (2 *Rev. Code*, p. 28.) with notice of the place where



the entry is, for which the printer may demand four shillings for each estray; and if no owner appears within a year and a day after publication, the property is vested in the owner of the lands whereon it was taken. But the former owner in either case may, at any time within five years afterwards, upon proving his property, demand and recover the valuation money, deducting therefrom the clerk's and printer's fees, and five shillings for every horse, or head of neat cattle, and one shilling for every other beast.

[In every case where the owner of an estray shall demand the valuation money therefor, or receive the estray, he shall, besides paying thereout the clerk's and printer's fees, in lieu of the other charges above allowed, pay to the person entitled, such compensation for keeping and supporting such estray, as shall be adjudged reasonable by any two freeholders, to be first sworn by a justice of the peace, in the county where the estray was taken up. 2 *Rev. Code*, p. 28.]

4. The same proceedings are to be had in the case of a boat or vessel adrift, describing her by her *kind, burthen, and built*. 1 *Rev. Code*, p. 18. sect. 4.

*Provided*, That if, after notice published, any estray shall die, or get out of the possession of the taker-up, without his default, he shall not be answerable for the same, or the valuation thereof, nor shall any taker-up be answerable for a boat or other vessel lost as aforesaid. *Ibid*.

### III. ADJUDICATIONS ON THIS SUBJECT.

He that takes an estray is bound, so long as he keeps it, to find it in provisions and preserve it from damage; and may not use it by way of labour, but is liable to an action for so doing. Yet he may milk a cow, or the like; for that tends to the preservation, and is for the benefit of the animal. 1 *Bl. Com.* 299. *Cro. Jac.* 148.

In trespass for taking and carrying away a gelding, if the defendant justify as for an estray, a replication that the defendant *used* the gelding is proper, and is not a departure in pleading; for he is thereby rendered a trespasser *from the beginning*. *Cro. Jac.* 148. 1 *Term. Rep.* 12.

In trespass for taking a hog, if the defendant pleads that he took the hog *damage feasant*, the plaintiff may reply, that after the taking and impounding the defendant converted the hog to his own use. *See the pleadings*. 3 *Wils.* 20.

Our act of Assembly merely prescribes the mode of proceeding on taking up estrays and does not, I conceive, interfere with the doctrine on that subject arising under the common law. On this presumption, the case of *Henly v. Walsh*. 2 *Salk.* 686, is worthy of observation.

*Trespass* for his horse: Defendant pleaded, that one *Pooly* was owner of the horse, and that the horse estrayed out of his possession, and came to the hands of the plaintiff, and that he, by command of *Pooly*, demanded the horse within the year, &c. and tendered amends, and that the plaintiff refusing to deliver him, he took him. To this there was a frivolous replication, and upon that a demurrer.

*And by the court.* 1st. Without telling any marks, or making any

proof of property (which may be done upon trial) the owner may seize his horse where he finds him. *But quare,*

2d. Though the defendant does not plead directly, that he tendered amends, but only that he demanded the horse, *offering satisfaction*, yet the court held this a direct affirmation.

3d. The court held, that though it was said he tendered amends *generally*, and did not express any sum certain, yet that was good in this case, and a difference was taken between this case and that of a tender of amends for a trespass. In that of a trespass, if the defendant pleads a tender of amends, he must shew what he tendered, for he must tender a certain sum; and the law puts this difficulty upon him, because he is the wrong doer, and the other is confessedly a party injured. But the owner of the estray is no wrong-doer, and it is impossible he should know how long his horse had been in possession of the taker-up, nor how much will make a proper satisfaction.

#### IV. PRECEDENTS.

##### (A) *Warrant to three freeholders, to view, appraise, and describe an estray.*

county, to wit.

To A F, and B F, and C F, freeholders of this county.

Whereas A T, of the said county, hath this day given information to me J P, a justice of the peace for the county aforesaid, that he hath taken up an estray (here express the kind) upon his own land. These are therefore, in the name of the commonwealth, to command you, having been first duly sworn for that purpose, before me, or some other justice of the peace for this county, to view and appraise the said estray, and to certify the value thereof under your hands, together with a particular description of the kind, marks, brand, stature, colour, and age of the said estray; which certificate, so made, you are forthwith to return to me. Given under my hand, &c.

J. P.

##### (B) *Form of the oath to be administered to the freeholders.*

You A F, B F, and C F, shall swear that you will faithfully, and to the best of your skill and judgment, view and appraise a certain estray (express the kind, whether horse, cow, &c.) taken up by A T, of this county, and that you will certify the valuation thereof, under your hands, to me (or to J P, a justice of the peace for this county, if the warrant issued from him) together with a particular description of the kind, marks, brand, stature, colour, and age of the same. So help you God.

##### (C) *Certificate of the freeholders.*

(On the back of the warrant, or on a piece of paper annexed to it, make the following return.

Pursuant to the within (or the above) warrant, to us directed, we have this day viewed an estray (express the kind, whether horse, mare

cow, &c.) shewn to us by A T, of this county ; and do find the same to be (here describe the kind, marks, brand, stature, colour, and age of the estray) and we do appraise the said to the sum of Certified under our hands this day of in the year

A. F.

B. F.

C. F.

The freeholders cannot well be too particular in the description of the estray ; because not only the injunctions of the law as expressed in the warrant require it, but an imperfect description often defeats the object of the law itself.

### (D) Advertisement of an estray.

Taken up, as an estray, by A. B. of the county of (describe the place as particularly as possible) a (describe the estray, by its kind, sex, age, stature, colour, &c.) appraised to

A. B.

### (E) Warrant to ascertain the compensation for keeping an estray.

county, to wit.

To A F and B F, freeholders, &c.

Whereas A B, of this county, on the day of, &c. did take up, as an estray, a certain (describe the kind) which has been proved before me (or before J P, a justice of the peace for the said county) to be the property of B O ; these are therefore to require you, having been first duly sworn before me, or some other justice of the peace for this county, for that purpose, to ascertain what compensation the said A B is entitled to, for keeping the said estray, and the same to certify to the said B O and A B. Given under my hand, &c.

Whatever sum is adjudged a reasonable compensation by the freeholders, must be paid or tendered by the owner to the taker-up.

## EVIDENCE.

- I. Of evidence in general. II. Of written evidence. III. Of the evidence of witnesses. IV. Of process to cause witnesses to appear. V. Of the manner of giving evidence.

### I. OF EVIDENCE IN GENERAL.

1. EVIDENCE, in legal understanding, doth not only contain matters of record, as letters patent, fines, recoveries, inrolments, and the

like, and writings under seal, as charters and deeds, and other writings without seal, as court rolls, accounts, and the like; but in a larger sense, it containeth also the testimony of witnesses, and other proofs to be produced and given, for the finding of any issue joined between the parties. And it is called evidence, because thereby the point in issue is to be made evident to the jury. 1 *Inst.* 282. a.

2. The first and most signal rule in relation to evidence is, that a man must have the utmost evidence the nature of the fact is capable of. (*Gill. Ev.* 4. *Peake's Ev.* 8, 9.) But it does not require *all* the evidence. *Peake's Ev.* 9.

3. Many times juries, together with other matter, are much induced to presumptions; whereof there are three sorts, violent, probable, and light or temerary. Violent presumption many times amounts to full proof; as if one be run through the body with a sword in a house, whereof he instantly dieth, and a man is seen to come out of that house with a bloody sword, and no other man was at that time in the house. Probable presumption moveth little; but light or temerary presumption moveth not at all. 1 *Inst.* 6. b.

If all the witnesses to a deed be dead (as no man can keep his witnesses alive, and time weareth out all men) then violent presumption, which stands for a proof, is continual and quiet possession; although the deed may receive credit, from a comparing of seals, writing, and the like. *Ibid.*

4. The common law did not require any certain number of witnesses, for the trial of any crime whatsoever. *Haw. B.* 2. c. 46. sect. 2.

5. Two witnesses are necessary in cases of treason. (1 *Rev. Code*, p. 272. C. U. S. art. 3. sect. 3.

6. In those courts which proceed by the rules of the civil law, as the courts of equity, two witnesses are generally required: and the reason why the civil law requires two witnesses is, because their trial is by witnesses, and not by a jury of twelve men. (1 *Inst.* 6. b. *Plowd.* 12. a.) But a better reason seems to be, because the defendant, in a court of equity, being called on to give evidence against himself, his oath shall be considered as good evidence, till the contrary appear; and if but one witness swears in opposition to the defendant's answer, it is but oath against oath.

7. The evidence must be applied to the peculiar fact in dispute, and therefore no evidence not relating to the issue, or in some manner connected with it, can be received. *Peake's Ev.* 6. (2d edit.)

8. Nor can the character of either party to a civil cause be called in question, unless put in question by the very proceeding itself; for every cause is to be decided by its own circumstances, and not to be prejudiced by any matter foreign to it. *Ibid.*

9. But in an action for criminal conversation, the defendant may give in evidence *particular facts* of the wife's adultery with others, or having a bastard before marriage; because, by bringing the action, her husband puts her general behaviour in issue; but he cannot have any instance of her misconduct subsequent to the act of adultery. *Peake's Ev.* 7.

10. In criminal cases, in general, the prosecutor cannot enter into the defendant's character, unless the defendant enable him to do so, by first calling witnesses to support it; and even then, the prose-

cutor cannot examine to particular facts, the general character of the defendant not being put in issue, but coming in collaterally. (*Peake's Ev.* 7, 8.) But where the defendant's character is put in issue by the prosecution, the prosecutor may examine to particular facts, for it is impossible without it to prove the general charge. *Peake's Ev.* 7. Yet in the case of *barratry*, the prosecutor is not allowed to examine into particular facts, without giving previous notice of it to the defendant. *Ibid.*

11. What a party *admits*, whether he is suing in his own right or merely as trustee for another, or which another asserts in his presence, and he does not *contradict*, is received as evidence against him; but no evidence is received of what is said by his wife, or any other member of his family, in his absence, unless in cases where it appears that they were employed, or entrusted by him in the management of a business. *Peake's Ev.* 16, 17. But a distinction has been made between an *admission* and an *offer of compromise*, after a dispute has arisen. An offer to pay a sum of money in order to get rid of an action, is not received as evidence of a debt; for it must be permitted to men to 'buy their peace,' without prejudice to them, if such offer did not succeed. *Peake's Ev.* 18, 19.

12. But admissions of *particular articles*, before an arbitrator, or otherwise, are good evidence. *Peake's Ev.* 19.

13. So, *acts* done by a party will sometimes preclude him from disputing his *situation*. As if a man holds himself out to the public as filling any *particular station*, he prevents the necessity of evidence against him to prove that he is legally entitled to it. Thus, if a man lives with a woman to whom he is not married, and suffers her to pass in the world as his wife, he will be answerable for such contracts made by her, as would be binding on him, if made by a woman to whom he was actually married. *Peake's Ev.* 20.

14. So, in many cases, if one man treats with another as filling a particular station, and derives a benefit from him, he will not afterwards be permitted to dispute his title. As when A rented the glebe lands of a rectory of B, the incumbent, and paid him rent, he was not permitted, in action for use and occupation, to dispute the title of his lessor, by proving that his presentation was simoniacal. *Peake's Ev.* 21.

15. In all cases where positive and direct evidence is not to be obtained, the proof of circumstances and facts, consistent with the claim of one party, and inconsistent with that of the other, is deemed sufficient to enable a court of justice, or, more correctly speaking, a jury under its direction, to *presume* the particular fact which is the subject of controversy. Long and undisputed possession of any right or property affords a presumption that it had a legal foundation, and rather than disturb mens' possessions, even records have been presumed as *grants, patents, &c.* *Peake's Ev.* 22. 2 H. & M. 370.

16. So, if a landlord gives a receipt for rent due at one time, and claims rent at a day preceding, it furnishes a strong presumption that such rent has been paid; and where a stale demand is made in a court of justice, the very circumstance of its coming late, in all cases, inclines the mind to suspect that it has no just foundation, and in many has been taken as complete evidence of the non-existence or payment of it; but these latter cases resting on presumption, and not on posi-

tive proof, very slight evidence is sufficient to rebut and overturn them, and to call on the different parties to establish their respective rights by the ordinary rules of evidence. *Peake's Ev.* 24.

## II. OF WRITTEN EVIDENCE.

17. Acts of Assembly relate either to the commonwealth in general, and are therefore called general acts, or only to the concerns of private persons, and are thence called *private acts*. *Gilb. Ev.* 8.

18. A general act is taken notice of by the judges and jury, without being shewed; and hence it is that it hath been said, that the *printed statute book* is good evidence of general acts; not that the printed statutes are the perfect and authentic copies of the records themselves, but every person is supposed to know the law; and therefore the printed statutes are allowed to be evidence, because they are the hints of that which is supposed to be lodged in every man's mind already. *Gilb. Ev.* 8, 9, 36.

'Private acts of Assembly may be given in evidence without pleading them specially.' 1 *Rev. Code*, p. 112. *Gilb.* 36.

20. 'Papers read in evidence, though not under seal, may be carried from the bar by the jury.' *Ibid.*

21. Records of the courts prove themselves, and cannot be proved by witnesses. No rasure or interlining shall be intended in them. 10 *Co.* 92.

22. And nothing shall be admitted as evidence of what was done at another trial, till the record of that trial be produced. *Gilb. Ev.* 61, 68.

23. But a record of a criminal conviction shall not be given in evidence in a civil action; because such conviction might have been upon the evidence of a party interested in the civil action. *Cases temp. Hardwicke* 212.

24. Depositions of witnesses may be read when the witness is dead, but not when the witness is living; for whilst the witness is living, they are not the best evidence the nature of the thing is capable of. *Gilb. Ev.* 54.

25. Yet they may be read when a witness is sought and cannot be found; for then he is in the same circumstances, as to the party that is to use him, as if he were dead. *Ibid.*

26. So if it is proved that a witness was subpoenaed, and fell sick by the way; for in this case, likewise, the deposition is the best evidence that can be had, and that answers what the law requires. *Ibid.*

27. The circumstance that a witness has been *summoned* and fails to attend, is not sufficient to authorise the reading of his deposition taken *de bene esse*; but it must be proved that he is dead, or, if living, unable to attend. 2 *H. & M.* 51.

28. But a deposition cannot be given in evidence against any person that was not party to the suit; and the reason is, because he had not liberty to cross-examine the witness; and it is against natural justice, that a man should be concluded by proofs in a cause to which he was not a party. *Gilb. Ev.* 55.

29. Yet this rule admits of some exceptions; as, particularly, in all cases where hearsay and reputation are evidence; for undoubtedly what a witness, who is dead, hath sworn in a court of justice, is of more

credit than what another person swears he hath heard him say. So a deposition taken in a cause between either parties will be admitted to be read, to contradict what the same witness swears at a trial. *Ibid.* 53.

30. As to the admission of the information of a witness taken on an examination before a justice, see title 'CRIMINALS.'

31. Anciently, depositions taken in *perpetuam rei memoriam* were not published till after the death of the witnesses, because they were no evidence while the witnesses were living; but this practice was found very inconvenient, because thereby witnesses became secure in swearing whatever they pleased, inasmuch as they never could be prosecuted for perjury. *Gilb. Ev.* 58.

32. What a man who is living hath sworn at one trial can never be given in evidence at another to support him, because it is no evidence of the truth; for if a man be of that ill mind to swear falsely at one trial, he may do the same at another on the same indictment; but what a man says in discourse, without premeditation or expectation of the cause in question, is good evidence to support him, because that shews that what he swears is not from any undue influence. But if a man hath sworn at one trial different from what he hath sworn at another, this is good evidence as to his discredit. *Gilb. Ev.* 62.

33. What a witness swore at a former trial, *who is since dead*, may be proved, by giving the verdict in evidence, and the oath of the party deceased; but where you give in evidence any matter sworn at a former trial, it must be between the same parties, because otherwise you dispossess your adversary of the liberty to cross-examine. *Gilb. Ev.* 61.

34. If a *verdict* be had on the same point, and between the same parties, it may be given in evidence, although the trial was not had for the same lands. *Gilb. Ev.* 24. 2 *H. & M.* 55.

35. But then the verdict must be between those who were parties or privies to it; because, otherwise, a man would be bound by a decision, who had not the liberty to cross-examine; and nothing can be more contrary to natural justice, than that any body should be injured by a determination, that he, or those under whom he claims, was not at liberty to controvert. *Gilb. Ev.* 25. *Peake's Ev.* 38.

36. And a verdict will not be admitted in evidence, without likewise producing a copy of the judgment founded upon it; because it may happen, that the judgment was arrested upon a new trial granted. But this rule doth not hold, in the case of a verdict on an issue directed out of chancery; because it is not usual to enter judgment in such case; and the decree of the court of chancery is equally proof that the verdict was satisfactory, and stands in force. *Theory of Ev.* 21.

37. No body can take benefit by a verdict that had not been prejudged by it, had it gone contrary. (*Gilb. Ev.* 28.) Even though his title turns upon the same point, because if he be an utter stranger to the fact, it is perfectly *res nova* between him and the defendant. *Ibid.* 29.

38. But the record of the verdict and judgment, upon a verdict of enquiry, in a suit by the mother of the plaintiff, against a third person, in which record the *ground* of the judgment does not appear, may be given in evidence, to prove that the mother *had recovered her freedom*;

not that she was entitled to it, by being descended of parents who were free ; but the questions, upon *what grounds* the judgment in the suit was given, and whether the descendant was born *after* the mother acquired her right of freedom, or not, ought not to be left open. 2 H. & M. 193.

✍ A judgment for the recovery of a debt is conclusive evidence ; and if a party suffer a judgment to go by default ; or on being sued, or distrained for rent, pay the money, protesting that it is not due, he will not be permitted to recover it back, even if he can prove that he paid it before. So, if the plaintiff attempts to prove all the items of an account, and fails, he cannot afterwards establish them ; but it is otherwise if he only attempt to prove part. *Peake's Ev.* 35. 36.

39. A decree in chancery may be given in evidence between the same parties, or all claiming under them ; for their judgments must be of authority in these cases, where the law gives them a jurisdiction : for it would be very absurd, that the law should give them a jurisdiction, and yet not suffer what is done by force of that jurisdiction to be full proof. *Theory of Ev.* 36, 37.

40. And note, whenever a matter comes to be tried in a collateral way, the decree, sentence, or judgment of any court, having competent jurisdiction, is conclusive evidence of such matter : and in case the determination is final in the court, of which it is a decree, sentence or judgment, such decree, sentence, or judgment will be conclusive in any other court, having concurrent jurisdiction. *Ibid.* 37. *Peake's Ev.* 76.

41. But in these cases, a stranger is always at liberty to shew, that such judgment, sentence, or decree, was obtained by *fraud and collusion* between the parties to it ; for fraud is an extrinsic collateral act, which vitiates the most solemn proceedings of courts of justice ; and though it is not permitted to shew that a court was *mistaken*, it may be shewn that it was misled : but the parties to them are not permitted to avail themselves of their own fraud. *Peake's Ev.* 76.

42. A deed was offered to be produced, which bore date thirty-eight years before, without proving that the witnesses were dead ; and allowed by the court. They said that in general forty years was allowed to be the rule ; but the courts never tied themselves up strictly to that rule, but thirty-nine, thirty-eight, nay, thirty-five, have been allowed. 1 *Barnard.* 348. *Peake's Ev.* 109, 110.

43. Upon a trial at bar, a deed was offered in evidence, executed thirty-six years ago, without proving the hands ; which was opposed by the other side ; but admitted by the court, who said, there was no fixed rule about it, but that it had often been allowed, where a deed was but twenty-five or thirty years old. 12 *Viner* 57.

44. In cases where writings have been lost by burning of houses, by rebellion, or when robbers have destroyed them, or the like ; the law, in such cases of necessity, allows them to be proved by witnesses. *Jenk.* 19. *Wood, b. 4. c. 4.* *Peake's Ev.* 96, 97.

45. If a man destroys a thing that is designed to be evidence against himself, a small matter will supply it ; and therefore the defendant having torn his own note signed by him, a copy sworn was admitted to be good evidence to prove it. *L. Raym.* 731.

46. Where the defendant himself has the deed which concerns the



land in question, and refuses (after notice) to produce it ; a copy thereof will be permitted to be given in evidence, on its being proved to be a true copy. And if the party has no copy, he may produce an abstract, nay, even give parol evidence of the contents ; because in such case it may be impossible to give better evidence. In civil causes, the court will sometimes oblige parties to produce evidence which may prove against themselves ; or leave the refusal to do it (after proper notice) as a strong presumption to the jury. The court will do it, in many cases, under particular circumstances, by rule before the trial ; especially, if the party from whom the production is wanted applies for a favour. *Theory of Ev* 54.

47. But in a *criminal* or *penal* cause, the defendant is never forced to produce any evidence, though he should hold it in his hands in court. 4 *Burrows*, 2489.

48. The *original*, in case of private deeds or other instruments, must always be produced, if in the power of the party using it ; till which done, no evidence whatever of the contents can be received ; but where the original has been destroyed, or lost by accident, as where an original award was lost in a mail which was robbed ; or being in the hands of the adverse party, notice has been given him to produce it ; then an examined copy, or even parol evidence of the contents, being the best evidence in the power of the party, is received ; it being first proved that the original, of which such secondary evidence is offered, was a genuine instrument. *Peake's Ev* 96, 97.

49. If the original instrument be supposed to be in the hands of a third person, he should be served with a *subpoena duces tecum*, to produce it ; and lest he should have delivered it to the adverse party before the service of the *subpoena*, it may be prudent also to give notice to the latter to produce it. But, if after service of the *subpoena* the person in whose possession the instrument then was delivers it to the other party, for the purpose of avoiding the effect of the writ, this will not render it necessary to give him notice to produce it, but the party so calling for it may, in such case, give parol evidence of its contents. *Peake's Ev* 97.

50. If there be a subscribing witness who is living, and in a situation to be examined, he alone is competent to prove the execution, because he may know and be able to explain facts attending the transaction, which are unknown to a stranger ; and for this reason, a *confession* or acknowledgment of the party to the deed, whether it be offered as evidence against him, or against a third person, will not excuse this testimony. This rule of evidence extends to all cases, whether the deed be an existing instrument, or cancelled, and even if it be lost, and parol evidence given of its contents, the subscribing witness, if known, must be called ; but if he is not known, any other person who has seen it is a competent witness. *Peake's Ev* 97, 98.

51. If there be no subscribing witness to a deed, or such witness being called denies having seen the instrument executed ; or it appear that the name of a fictitious person has been put as a witness by the party himself who executed the deed ; or the person really attesting it at the time of the execution of the deed interested in it, and continues so at the time of the trial ; in these

cases, proof of the hand-writing of the party will be sufficient; and, if the instrument, on the face of it, purport to be sealed and delivered, such proof alone is strong evidence for a jury to presume that the other formalities were complied with. *Peake's Ev* 98, 99.

52. When the subscribing witness is dead, or absent in a foreign country, at the time of the trial, whether for a permanent residence, or temporary purpose, or by the commission of some crime, or the accrual of some interest subsequent to the execution of the instrument, he has become an incompetent witness; proof of his hand-writing is the next best evidence which can be given. In the first case, viz. where he is dead, this alone has been held sufficient; but in the others, it has been usual (and in one case was held to be necessary) to prove the hand writing of the party to the deed also, and, in all these cases, a foundation must first be laid, by proving the situation in which the witness stands. *Peake's Ev.* 100, 101.

53. It frequently happens that there are more than one witness to a deed (and in case of a will of lands more are expressly required) yet in these cases it is sufficient if one be called; but if they are all dead, the deaths of all should be proved before evidence is received of the hand-writing of either, for until it appears that neither of them is living, the other is not the best evidence which the nature of the case will admit of. *Peake's Ev.* 101, 102.

54. The belief that it is the hand-writing of such a person is always received as presumptive evidence of the fact, either in civil or criminal cases. But the person who speaks to that belief must have such a knowledge as enables him to form it, such as having seen the party write, or having received letters from him in a course of correspondence; barely having seen letters purporting to be franked by him, or other papers, which he has no authentic information are of the party's hand-writing, is not sufficient. *Peake's Ev.* 102.

55. Where a rent charge was granted by deed, and the deed happened to be lost, it was said by Lord Hardwicke, the plaintiff cannot read a copy in evidence at law, but must either set up a prescriptive title to the rent, from a constant and uninterrupted payment, or he must bring his bill in equity, to be relieved against the accident of the original's being lost. And the same rule holds in case of a bond; for though an hundred witnesses could prove the substance of it, yet it is not sufficient at law, for the plaintiff must declare upon it, setting forth that he produceth it in court. 2 Atk. 61. *Gilb. Ev.* 84.

56. If a bond or other deed be pleaded with a profert, and the defendant plead *non est factum*, and the plaintiff produce the bond, &c. at the trial, he will be nonsuited. 4 East. 585.


57. But if the bond or deed be lost, or destroyed, or in the possession of the adverse party, the want of a profert may be excused. 3 Term. Rep. 151. See us to the form of excusing the want of profert, 2 Chitty on Pleading, 153. *Hening's Amer. Pleader*, title 'DEBT.'

58. An indenture to guide the uses of a common recovery was offered in evidence, but the seals were torn off; yet it being proved to have been done by a little boy, it was allowed to be read. *Palm.* 402. See 11 Mod. 11.

59. If, upon a collateral issue, it is to be proved that such a one was

justice of the peace, or the like; common reputation is sufficient proof, without shewing the commission. *Tr. per pais* 347.

60. The copy of the probate of a will, certified by the clerk of the court, may be given in evidence in any court of record in this commonwealth. 1 *Rev. Code*, p. 165, sect. 36.

61.  For the rules of admitting foreign deeds as evidence, see 1 *Rev. Code*, ch. 91, p. 160.

62. And generally, wherever an original is of a public nature, and would be evidence if produced, an immediate sworn copy thereof will be evidence, as a copy of a bargain and sale, of a deed inrolled, and the like; but where an original is of a private nature, a copy is not evidence, unless the original is lost or destroyed. 3 *Salk.* 154.

63. On a warrant to a constable to distrain goods by virtue of an act of Assembly, the constable makes distress, and returns the overplus to the offender, but keeps the warrant. Resolved, That a copy of the warrant in this case will be good evidence. 6 *Mod.* 83.

64. An inquisition *post mortem* is evidence, but not conclusive. 2 *T. Jones* 224.

65. The entry of the names of persons in a church-book either for marriages or births is evidence, but not conclusive evidence of the marriage or birth of any persons, unless the identity of the person (by such entries intended) is fully proved, and also strengthened with circumstances, as cohabitation, the allowance of the parties themselves, and the like. 12 *Vin.* 89.

66. The indorsement on a bond by the obligee, of payment of interest, was allowed to be given in evidence by the administrator, to take off the presumption from the length of time. (*L. Raym.* 1371.) But if the endorsement is made after the presumption has taken place, it is not evidence. *Stra.* 827.

67. A shop-book was allowed for evidence, it being proved that the servant who wrote the book was dead, and this was his hand, and he accustomed to make the entries, and no proof was required of the delivery of the goods; and *Holt*, Ch. J. said it was as good evidence as the proof of a witness's hand to an obligation; and he held, that though the statute of the 7th J. says, a shop-book shall not be evidence after the year, yet it is not of itself evidence within the year. 2 *Salk.* 690.

68. A man's book of accounts is no evidence for the owner of the book, but for the adverse party; for his book cannot be of better credit than his oath, which would not serve in his own case. *Tr. per pais* 348.

69. A copy of an inscription on a grave stone hath been allowed to be given in evidence.

70. The examination of an Almanack, that such a day of the month was *Sunday*, was ruled to be sufficient; and that a trial of this by a jury is not necessary, although it is a matter of fact. *Cro. Eliz.* 227.

71. An Almanack, wherein the father had writ the nativity of his son, was allowed as evidence to prove the non-age of his son. *Raym.* 84.

72. A general history may be read to prove a matter relating to the country in general, but not a particular one. 1 *Salk.* 281.

73. It seems to have been generally holden, since the reversal of the attainder of *Algernon Sydney*, that similitude of hands is not evidence in any criminal case, whether capital or not capital. 2 *Haw.* 431. *L. Raym.* 39.

74. And generally, it is said, that similitude of hands is no evidence ; but saying that he was well acquainted with his writing, and knew it to be the party's, is evidence. 12 *Viner*, 204.

75. And in general cases, the witness should have gained his knowledge from having seen the party write ; but under some circumstances that is not necessary ; as where the hand-writing to be proved is of a person residing abroad, one who has frequently received letters from him in a course of correspondence would be admitted to prove it, though he had never seen him write. So where the antiquity of the writing makes it impossible for any living witness to swear he ever saw the party write ; as where a parson's book was produced to prove a modus, the parson having been long dead, a witness, who had examined the parish books, in which was the same parson's name, was permitted to swear to the similitude of the hand-writing, for it was the best evidence in the nature of the thing, for the parish books were not in the plaintiff's power to produce. *Theory of Ev.* 25, 26. 1 *Bl. Rep.* 384.

76. On the trial of an issue out of chancery, before lord *Manfield*, where it was disputed, whether the name of one *William Jones*, subscribed to a declaration of trust, was genuine ; and, to prove the hand-writing forged, a witness was produced, who had frequently corresponded with *Jones*, but had never seen him write. Lord *Manfield*, upon debate, held him to be a good evidence, and his testimony accordingly was admitted. *Bl. Rep.* 384.

77. Parol evidence shall not be admitted to annul, or substantially vary, a written agreement. 3 *Wils.* 275. 2 *Bl. Rep.* 1249. 3 *Term. Rep.* 590. *Str.* 794. *Stra.* 1261.

78. But where the meaning of a written instrument is ambiguous, parol evidence may sometimes be admitted to explain it. 3 *Wils.* 276. *Cowp.* 53. 3 *Term. Rep.* 473. *Ibid.* 474. *Ibid.* 609.

79. See as to the general rule of not admitting parol evidence to vary a written instrument, and the exceptions to it. *Sug. L. Vend.* 87, &c.

### III. OF THE EVIDENCE OF WITNESSES.

80. See the observations under title 'CONFESSION,' as to the admissibility of a man's own confession, in criminal cases.

81. There are many circumstances that disable a juror, that are not sufficient exceptions against a witness. Thus the exception of kindred is a good cause of challenge against a juror, but not against a witness ; therefore the father may be a competent witness for or against his son, or the son for or against his father. These and the like exceptions may be to the credit or credibility of the witness, but are not exceptions against his competency. 2 *Hale* 276.

82. For the exceptions to a witness are of two kinds. 1. Exceptions to the credit of the witness, which do not at all disable him from being sworn, but yet may blemish the credibility of his testimony

and in such case the witness is to be allowed, but the credit of his testimony is left to the jury. 2. Exceptions to the competency of the witness, which do exclude him from giving his testimony, and of these exceptions the court is the judge. 2 *Hale* 276, 277.

83. It seems agreed, that an attainder, judgment, or conviction of treason, felony, piracy, perjury, or forgery, and also a judgment in attain for giving a false verdict, or in conspiracy, at the suit of the commonwealth, and also judgment for any heinous crime to stand on the pillory, or to be whipped or branded, are good causes of exception against a witness, while they continue in force. 2 *Haw.* 432. *Theory of Ev.* 107.

84. In the case of Pendock and Mackender, the question was, whether a person convicted and whipped for petit larceny shall be allowed to be a witness. And the court were clearly of opinion, that he shall not; and laid it down as a rule, that it is the crime that creates the infamy, and not the punishment for it. Petit larceny is felony; and there is no case where a person convicted thereof was ever admitted to be a witness. 2 *Wils.* 18.

85. But it is agreed, that no such conviction or judgment can be made use of to this purpose, unless the record be actually produced in court. 2 *Haw.* 433.

86. Also, it is a general rule, that a witness shall not be asked any question, the answering to which might oblige him to accuse himself of a crime; and that his credit is to be impeached only by general accounts of his character and reputation, and not by proof of particular crimes, whereof he never was convicted. *Ibid.*

87. And a man shall not be permitted to swear, that he was suborned and perjured. *St. Tr. V.* 3. 427.

88. And lord Coke says, a witness alledging his own infamy or turpitude is not to be heard. 4 *Inst.* 279. 1 *W. Bl. Rep.* 364.

89. Thus, a wife was disallowed to be a witness to prove her husband had no access to her, in a case of bastardy. *Sess. Cases, V.* 2. 175.

90. It seems clear at this day, that outlawry in a personal action is not a good exception against a witness, as it is against a juror. 2 *Haw.* 433.

91. A person convicted of felony, who is admitted to his clergy, and burnt in the hand, is thereby re-enabled to be a witness. *Ibid.* See 1 *Rev. Code*, p. 278. sect. 1.

92. And it seems agreed, that the executive's pardon of treason, or felony, after a conviction or attainder, restores the party to his credit. 2 *Haw.* 433. 1 *Rev. Code*, p. 278. sect. 1.

93. But a person convicted of perjury shall never be a witness. 1 *Rev. Code*, p. 278. sect. 2.

94. Want of discretion is a good exception against a witness; on which account alone it seems, that an infant may be excepted against. 2 *Haw.* 434.

95. But if an infant be of the age of fourteen years, he is as to this purpose of the age of discretion to be sworn as a witness; but if under that age, yet if it appear that he hath a competent discretion, he may be sworn. 2 *Hale* 278.

96. And in many cases, an infant of tender years may be examined,

where the exigence of the case requires it; which possibly, being fortified with concurrent evidences, may be of some weight; especially in cases of rape, buggery, and such crimes as are practised upon children. 2 *Hale* 279, 284.

97. But in no case shall an infant be admitted as evidence without oath. *Str.* 700. 1 *Atk.* 29.

98. *Infancy* is to be tried by inspection, and if, upon inspection, the court have any doubt of the age of the party, it may proceed to take proofs of the fact; and, particularly, may examine the infant himself, upon an oath of *voir dire* (*to speak the truth*) that is, to make true answers to such questions as the court shall demand of him: or the court may examine his mother, his god-father, and the like. 3 *Bl. Com.* 332.

99. It seems an uncontroverted rule, in all cases, that it is a good exception against a witness, that he is either to be a gainer or loser by the event of the cause, whether such advantage be direct and immediate, or consequential only. 2 *Haw.* 433.

100. Thus, in an information upon the statute of usury, the party to the usurious contract shall not be admitted to be a witness against the usurer, for in effect he should be witness in his own cause, and should avoid his own bonds and assurances, and discharge himself of the money borrowed. 1 *Inst.* 6.

101. Thus also, an attorney ought not to be examined against his client, because he is obliged to keep his secrets; but of his own knowledge before retainer, he may be examined as a witness, if served with a subpoena. *Wood*, b. 4. c. 4.

102. So, a *bail* cannot be a witness for his *principal*. (1 *Term Rep.* 164.) But the practice is to give other bail, and then the first may be admitted as a witness.

103. A factor who received a commission on the sale of the goods was allowed to be a good witness to prove their delivery. 3 *Wils.* 10.

104. A person interested may be restored to his competency, by parting with his interest, before he is sworn, by a release, &c. See 2 *Salk.* 691. 1 *Burr.* 423. 3 *Term Rep.* 27. *Doug.* 134. 1 *Bl. Rep.* 365. *Peake's Ev.* 158.

105. But upon an indictment for battery, or the like, the party ~~pleaded~~ may be a witness against the defendant, because the prosecution is at the suit of the commonwealth. *Wood*, b. 4. c. 5. *Peake's Ev.* 148.

106. And in many criminal cases, from the necessity of the thing, interested persons are allowed as witnesses. As where the owner prosecutes an indictment of felony for stolen goods, he is concerned in interest; for he will be intitled to restitution: and yet his evidence is admitted, &c. See 10 *Mod.* 193.

107. If a person be made a defendant with others, for the mere purpose of excluding their testimony, which is frequently done, and no evidence whatever be given against the person so improperly made a defendant, he will be intitled to an acquittal, the moment the plaintiff has closed his case, and may then be examined as a witness on behalf of the other defendant. *Peake's Ev.* 152.

108. But if there be the slightest evidence to charge one defendant, he cannot be a witness for the others; because the question, as to his

liability, must wait the final event of the verdict, and the jury may, of their own knowledge, have further information of the fact, than what they collect from the witnesses in court. (*Peake's Ev.* 153.) But this applies in *assumpsit*.

109. If the plaintiff, in his declaration, state that the defendant, together with A B, committed a *trespass*, this will not deprive the defendant of the testimony of A B, unless evidence is given of his having been concerned in the fact, and that process had issued against him, and endeavours used to serve him with it. *Ibid.*

110. But if *separate* actions be brought against two for a joint trespass, one defendant may be a witness for the other. 1 *Wash.* 187.

111. Witnesses, who, at first sight, seem objectionable on the ground of rule, are admitted, because they have a *counter interest*. Thus, the acceptor of a bill of exchange is a competent witness in an action against the drawer, to prove that he had no effects, and thereby prevent the necessity of notice to him; for, though by supporting the action against the drawer, he relieves himself from an action at the suit of the holder, he, at the same time, gives an action against himself at the suit of the drawer, in which the evidence he has given of the want of consideration will not avail him, but must be proved by another witness. *Peake's Ev.* 154, 155.

112. Where the interest is merely *formal*, and the person called as a witness can neither be benefitted nor injured by the event of the cause, he shall be admitted; as a guardian, in socage, who may be examined, in behalf of his ward: so, a grantee, executor, or devisee, who is merely a trustee, and has no beneficial interest, may, in cases where he is not a party on the record, give evidence of the grant to him, or in support of the will, by proving the sanity of the testator, and the circumstance of his having acted in the trust, will not render him incompetent. But a guardian *on record*, is really interested in the event of the suit, being liable to the costs, in case the verdict is against the infant he protects. *Peake's Ev.* 156.

113. A party appellee cannot be received as a witness for his co-appellees, either upon his releasing to them his interest in the subject in controversy, or upon *his* or *their* depositing with the clerk a sum of money sufficient to cover the costs. 2 *H. & M.* 467.

114. The *interest* must exist at the time of the *fact* which the witness is to prove happened, or be thrown upon him afterwards by operation of law, or by the act of the party who requires his testimony; for if, *after the event*, the witness becomes interested by his own act (as by laying a wager on the event of the cause) without the interference or consent of the party by whom he is called, such subsequent interest will not render him incompetent. *Peake's Ev.* 157, 158.


115. The *interest*, too, must exist at the time of the *trial*; and therefore, when a witness is interested, by being answerable to one of the parties; or will have a demand on that party, in case the cause is unsuccessful; a *release* from the *party* to the *witness*, or from the *witness* to the *party*, as the case may require, by taking away his interest, restores his competency. *Peake's Ev.* 158.

116. And if the party, who wishes to use the witness, tenders a *release* to him, and he refuses to accept it; or the witness having a claim

tenders a *release* on his part, which is refused, he may be examined as a witness. *Ibid.*

117. A man who is interested in the event of a suit is objectionable only when he comes to prove a fact consistent with his interest; for if the evidence he is to give be contrary to his interest, he is the best possible witness that can be called, and no objection can be made to him by the party in the cause. In this case, however, he may sometimes object to be examined, because his evidence may subject him to future inconvenience. *Peake's Ev.* 160, 161.

118. As no man can be compelled to give evidence which tends to charge himself with a *crime*; so the same rule of law protects a man's *pecuniary* interest; and, therefore, he is not compellable to give any answer which may subject him to a *civil action*, or charge himself with a *debt*. But as a man cannot, by making his interest the same as that of the party who has a right to his testimony, deprive such party of the benefit of it; so neither can he, by voluntarily acquiring an interest the other way, enable himself to object to give evidence; and therefore, where a subscribing witness became bail for the maker, he was compelled to give evidence of the execution. *Peake's Ev.* 184, 185.

119.  How far a witness shall be compelled to answer questions tending to prove him *infamous*, or even *disgraced*, has been the subject of much discussion, and seems not to be fully settled. See *Peake's Ev.* 130, 132. 1 *Hall's Amer. L. Journ.* 223, the opinions of the twelve judges of England.


120. It is no good exception against a witness, that he hath a maintenance from the commonwealth; for every one may maintain his own witnesses. 2 *Haw.* 434.

121. A trustee may be a witness, if he hath released his trust; but not if he hath conveyed it over. *Sid.* 315.

122. An heir at law may be a witness concerning the title to the land, but the remainder-man cannot, for he hath a present interest, but the heirship is a mere contingency. 1 *Salk.* 283.

123. A witness laying a wager in the cause is no hindrance to his being a witness; for the other has an interest in his evidence, which he cannot deprive him of. *Farest.* 31. *Str.* 652. *Peake's Ev.* 158.

124. If a person apprehends himself to be interested in, though in strictness of law he is not, yet he ought not to be sworn; as, where the witness for the plaintiff apprehended that if the plaintiff should recover, he would remit a claim of some money which he (the plaintiff) had upon this witness; but if he should not recover, he would not remit it; although in strictness of law his recovering or not recovering in that case would not alter the claim; or, as in case where the witness owned himself to be under honorary, though not under a binding engagement to pay the costs. *Str.* 129.

125.  But the authority of the above rule has been much shaken by modern determinations; it being now held, that "an honorary obligation, which will be affected by the event of the cause, is not an objection to the competency of a witness" (1 *Cowp.* 144.) the courts having of late years endeavoured, as far as possible, to let the objection go to the *credit* rather than to the *competency*. 1 *Cowp.* 146. note.

And sir James Mansfield, chief justice, is represented to have said,



"that the same honour by which the witness considered himself bound to pay a sum of money, for which he was not liable, would lead him to speak the truth between the parties." 1 *Cowp.* 145.

126. If a man hath been examined on interrogatories, being at the time disinterested, and afterwards becomes interested, his deposition may be given in evidence; because his evidence must be taken as it stood at the time of his examination. So, if a witness to a bond becomes afterwards representative of the obligee, his hand must be proved in like manner as if he were dead. 2 *Atk.* 615. 2 *Vezev* 44.

127. Interested witnesses may be examined upon a *voir dire*, if suspected to be secretly concerned in the event; or their interest may be proved in court. 3 *Bl. Com.* 370.

128. It seems agreed, that the husband and wife being as one and the same person, in affection and interest, can no more give evidence for one another, in any case whatsoever, than for themselves; and that regularly the one shall not be admitted to give evidence *against* the other, by reason of the implacable dissension which might be caused by it, and the great danger of perjury from taking the oaths of persons under so great a bias, and the extreme hardships of the case. Yet some exceptions have been allowed in cases of evident necessity; as in the lord *Audley's* case, who held his wife, while his servant by his command ravished her; or, where a man is indicted on a forcible marriage on the statute; or, where either a husband or wife have cause to demand sureties of the peace, against the other. 2 *Haw.* 431, 432.

129. In suits in which the husband is not immediately and certainly interested, but may be so eventually, the wife is a *competent* witness; but the jury are to judge of her *credibility*. Thus, in *trover*, by R against B, for goods which had been lent by B to the wife of C, and conveyed by C to R, the wife of C is a competent witness. 1 *H. & M.* 154. See *Peake's Ev.* 175.

130. On an indictment for bigamy, the first wife cannot be a witness, but the second may; for the second marriage is void. *Bull. N. P.* 287. *Peake's Ev.* 174.

131. So, if a woman be taken away by force and married; on an indictment against the husband *de facto*, founded on the statute, she is a witness to prove the fact. *Gilb. Ev.* 120.

132. So, on an indictment against the husband for an assault on the wife, she may be a witness. *Str.* 633.

133. In an action against the husband for his wife's wedding clothes, the wife's mother was suffered to give evidence that they were bought on the credit of her own husband. *Str.* 504.

134. So, the declarations of the wife, as to the price for nursing the defendant's child, have been given in evidence to charge the husband; such matters being usually transacted by women. (*Str.* 537.) But this case has been denied to be law. See *Esp. N. P.* 722.

135. In an action for wages earned by the wife of the plaintiff from the defendant's intestate, the wife's acknowledgment of the receipt of twenty pounds was not allowed to be given in evidence against her husband. *Str.* 1092.

136. The wife is always permitted to swear the peace against the husband; and her affidavit has been permitted to be read on the appli-

cation to the court, for an information against the husband, for an attempt to take her away after articles of separation. *'Esf. N. P.* 721.

137. ☞ How far a person shall be admitted as a witness to invalidate an instrument which he has subscribed, and whether the rule applies only to *negotiable* instruments, has been a question much agitated, and seems not yet to be fully settled; the court of King's Bench having adopted one rule, and that of the Common Pleas another. See *1 Day's Rep.* 17, 19, note (d). *Ibid.* 301. *4 Burr.* 2251. *3 Term Rep.* 27. *Ibid.* 707. *7 Term Rep.* 60. *Ibid.* 601. *1 Bl. Rep.* 365. *1 'Esf. Rep.* (Day's edit.) 98, note (2). *Ibid.* 177, note (1). *2 'Esf. Rep.* (Day's edit.) 488, note (1).

138. The person in whose name an instrument has been *forged* has been uniformly held to be an incompetent witness to prove the forgery; and this is considered by lord *Ellenborough* as an anomaly in the law of evidence. (*4 East.* 582. *2 East's Cr. L.* 994. See *1 'Esf. Rep.* (Day's edit.) 98, note (1.) *where the cases are collected with great accuracy, and the different rules of the several state courts, on this point, shewn.*

139. ☞ The old cases upon the competency of witnesses have gone upon very subtle grounds. But of late years the courts have endeavoured as far as possible, consistent with those authorities, to let the objection go to the *credit* rather than to the *competency* of a witness. *3 Term Rep.* 32.

140. An objection to the *competency* of a witness may be made at any stage of the proceedings. *1 'Esf. Rep.* 37.

☞ *Alibi* evidence lies under great and general prejudice, and ought to be heard with uncommon caution. But if it appears to be founded in truth, it is the best negative evidence that can be offered; it is really positive evidence, which in the nature of things necessarily implies a negative. And, in many cases, it is the only evidence an innocent man can offer. *Fost.* 368.

141. It seems agreed, that it is no exception against a person's giving evidence, either for or against a prisoner, that he is one of the judges or jurors who are to try him. *2 Haw.* 432.

142. But, where a juror is called upon to give his evidence, he ought to give it upon oath openly in court, and not be examined privately by his companions. *Bac. Abr. Evid. A. 2.* *1 Rev. Code,* p. 101, sect. 14.

143. It hath been long settled, that it is no exception against a witness, that he hath confessed himself guilty of the same crime, if he hath not been indicted for it; for if no accomplices were to be admitted as witnesses, it would be generally impossible to find evidence to convict the greatest offender. *2 Haw.* 432.

144. "But an approver shall in no case be admitted." *1 Rev. Code,* p. 106.

145. It hath been adjudged, that where three persons are sued in three several actions on the statute, for a supposed perjury in their evidence concerning the same thing, they may be good witnesses in such actions for one another. *2 Haw.* 432.

146. "No negro, mulatto, or Indian, shall be admitted to give evi-

dence, but against or between negroes, mulattoes, or Indians." 1 *Rev. Code*, p. 278. sect. 3. *Ibid.* p. 412. sect. 4.

147. There were two witnesses to a deed, and one of them was blind. It was ruled by *Holt*, chief justice, that such deed might be proved by the other witness, and read; or might be proved, without proving that this blind witness is dead; or without having him at the trial, proving only his hand. *Ld. Raym.* 734.

148. If a witness is beyond the sea, it is usual to prove his hand, and that that he is beyond the sea. 12 *Viner* 224.

149. There were two witnesses to a bond, one in *Africa*, and the other in *Bedlam*, mad: on an order to prove an exhibit, *viva voce*, in chancery, a witness proved these facts, and their hands to the bond, as if dead. *Ibid.*

150. If a witness to a deed is dead, it is not sufficient to prove his hand writing, but it must be proved also that he is dead. 2 *Atk.* 48.

151. And where a person has lived abroad some years, after attesting a deed, there must be strict proof of his death; otherwise it is, where the witness has lived constantly in the country, from the time of subscribing his name to the day of his death; for in that case, a slight evidence of his death is sufficient, especially where the person who proves his hand knew him intimately, and swears that he believes him dead. *Ibid.*

152. But where the witness is dead, it is sufficient to prove the witness's hand, without proving the hand of the party. 12 *Viner* 224.

153. The sayings of a dead man are not to be given in evidence, to prove a particular fact. they are only to be admitted in proof of general usages and customs; but as for a particular fact, lying in the knowledge of a particular person, by his death the evidence is lost. *St. Tr. V.* 5. 436.

154. And it hath been agreed, that the evidence given by a witness at one trial, cannot in the ordinary course of justice be made use against a defendant, on the death of such witness, at another trial. (2 *Haw.* 430.) But this must be understood in criminal cases, for in civil actions the practice is otherwise. See *Onsl. N. P.* 231.

155. In the case of murder, what the deceased declared after the wound given may be given in evidence. 12 *Viner* 118. *Peake's Ev.* 15, 16.

156. But where such declaration is reduced into writing, the writing itself must be produced, and not evidence thereof given *viva voce*. *Ibid.* 119.

157. It is a general rule that hearsay is no evidence; for no evidence is to be admitted but what is upon oath; for if the first speech was without oath, another oath that there was such speech makes it no more than a bare speaking, and so of no value in a court of justice; and besides, the adverse party had no opportunity of a cross examination; and if the witness is living, what he has been heard to say is not the best evidence that the nature of the thing will admit. But though hearsay ought not to be allowed as direct evidence, yet it may be allowed in corroboration of a witness's testimony, to shew that he affirmed the same thing before on other occasions, and that he is still constant to himself. So, where the issue is on the legitimacy of a person, it seems the practice to admit evidence of what the parents have

been heard to say, either as to their being or not being married, for the presumption arising from the cohabitation is either strengthened or destroyed by such declaration, which, although not to be given in evidence directly, yet they may be assigned by the witness as a reason for his belief one way or other. So, hearsay is good evidence to prove who was a man's grand-father when he married, what children he had, and the like, of which it is not reasonable to presume that there is better evidence. So, to prove that a man's father or other kinsman beyond the sea is dead, the common reputation and belief of it in the family gives credit to such evidence; and for a stranger it would be good evidence, if a person swore that a brother or other near relation told him so, which relation is dead. So, in questions of prescription, it is allowable to give hearsay evidence, in order to prove general reputation; and where the issue was of a right to a way over the plaintiff's close, the defendants were admitted to give evidence of a conversation between persons not interested, then dead, wherein the right to the way was agreed. *Theory of Ev.* 111, 112. *Peake's Ev.* 10, 11, 12, 13.

158. 'Any person absenting himself beyond sea, or elsewhere, for seven years successively, shall be presumed to be dead, in any case wherein his death shall come in question, unless proof be made that he was alive within that time. But an estate recovered in any such case, if in a subsequent action or suit the person presumed to be dead shall be proved to be living, shall be restored to him who shall have been evicted; and he may moreover demand and recover the rents and profits of the estate, during such time as he shall have been deprived thereof, with lawful interest.' 1 *Rev. Code*, p. 33.

#### IV. OF PROCESS TO CAUSE WITNESSES TO APPEAR.

159. The compulsory means to bring in witnesses are of two kinds. 1. By process of *subpœna* issued in the commonwealth's name, by the justices, or others, where the trial is to be. 2. Which is the more ordinary and more effectual means (in criminal cases) the justices who commit the offender may at that time, or at any time after, and before the trial, bind over the witnesses to appear at court, and in case of their refusal either to come, or to be bound over, may commit them for their contempt in such refusal. 2 *Hale* 282.

160. Where a witness is a prisoner in execution for debt, he must be brought up by *habeas corpus ad testificandum*, to give his evidence. *St. Tr. V.* 2. 580. *V.* 4. 37.

161. Witnesses are privileged from arrest by the laws of *Virginia*. See 'ARREST.'

162. An attachment was granted against a witness for failing to attend, after having been served with a subpœna, and receiving one guinea, and the promise of a guinea a day, during his attendance, and his charges paid; although the party for whom he was summoned had his remedy, by action, on the statute of *Edw. L. Raym.* 1529.

163. But to ground an attachment, the service of the subpœna must be on the person of the witness, and not on his servant. And by *Lee Ch. J.* it hath been solemnly determined, that you must not only have an affidavit of tendering the real fees, but likewise of a tender of rea-

sonable charges, to ground an attachment. *Cas. Hardw.* 313. *Str.* 1054.

164. So, where a sum was tendered to a witness, which, in the opinion of the court, was too small, an attachment was refused. *Str.* 1150.

165. So, where a witness was subpoenaed at home, but no tender of fees made, who afterwards attended at court, but refused to be sworn, although he was there tendered his fees; the court refused an attachment, saying, that a witness improperly subpoenaed was to be considered as a stander by, and it was no contempt for a stander by to refuse to be sworn. *Bl. Rep.* 36.

166. And by the court, the witnesses ought to have a reasonable time to put their affairs in order, that their attendance upon the court may be as little prejudice to themselves as possible. *Str.* 510.

167. In criminal cases, if a witness hath been bound over, and does not appear, he shall forfeit his recognizance.

## V. OF THE MANNER OF GIVING EVIDENCE.

168. He who affirms the matter in issue, whether plaintiff or defendant, ought to begin to give evidence. *Lit.* 36.

169. The evidence both for and against a prisoner ought to be upon oath.

But this is not always necessary; and may now be dispensed with, in favour of those whose religious scruples will not permit them to take an oath. See title 'OATHS'

170. It is no satisfaction for a witness to say, that he thinks or persuades himself; and this for two reasons, by *Coke Ch. J.* 1. Because the judge is to give absolute sentence, and ought to have more ground than thinking. 2. Because judges, as judges, are always to give judgment, *secundum allegata et probata*, notwithstanding that private persons think otherwise. *Dyer.* 53.

171. The court may indulge a prisoner in examining the witnesses apart, but he cannot demand it of right. *St. Tr. V.* 4. 9.

172. In cases of life, no evidence is to be given against a prisoner but in his presence. *Haw. B. 2. c.* 46, sect. 1.

173. In every issue the affirmative is to be proved. A negative cannot regularly be proved; and therefore it is sufficient to deny what is affirmed, until it be proved: but when the affirmative is proved, the other side may contest it with opposite proofs, for this is not properly the proof of a negative, but the proof of some proposition totally inconsistent with what is affirmed: as if the defendant be charged with a trespass, he need only make a general denial of the fact, and if the fact be proved, then he may prove a proposition inconsistent with the charge, as that he was at another place at the time, or the like. *Theory of Ev.* 116, 117.

174. But to this rule there is an exception of such cases, where the law presumes the affirmative contained in the issue. Therefore, in an information against lord *Halifax* for refusing to deliver up the rolls of the auditor of the exchequer, the court of exchequer put the plaintiff upon proving the negative, namely, that he did not deliver

them ; for a person shall be presumed duly to execute his office, till the contrary appear. *Ibid.* 117.

175. A prisoner may not call witnesses to disprove what his own witnesses have sworn. *St. Tr. V. 4.* 764, 792.

176. A witness shall not be permitted to read his evidence, but he may look upon his notes to refresh his memory. *St. Tr. V.* 445.

177. A witness shall not be cross-examined, till he has gone through the evidence for the party on whose side he was produced. *St. Tr. V. 2.* 792.

178. And it seems agreed, that where a witness at one trial varies from his own evidence at another, in relation to the same matter, such variance may be given in evidence to invalidate his testimony at the second trial. *2 Haw.* 430.

179. The counsel of that party which doth begin to maintain the issue ought to conclude. *Tri. p. pais* 220.

180. If, in the course of the trial, either party offer evidence which is thought to be inadmissible by the other, and the court do, notwithstanding, admit it, the party who moved the court to reject the evidence may *except to their opinion*. See *Bull. N. P.* 314.

181. But if on the evidence given a doubt in law arises, or either party considers it as insufficient to support the issue joined, he may *demur to the evidence*, and thus arrest the cause from the cognizance of the jury (except so far as to assess conditional damages) and submit it to the court, on the law arising from the facts stated in the demurrer. See *Bull. N. P.* 313. *Hargrave's Coke Littleton* 155. b. note (5.)

182. As *bills of exceptions*, and *demurrers to evidence*, frequently occur in practice, it is presumed that the following precedents will be a proper conclusion to this title.

### *Bill of Exceptions.*

A. P.	} In debt (case, &c. as the action is.)
v.	
B. D.	

Be it remembered, that on the trial of this cause, the counsel for the plaintiff (or defendant, as the case may be) to maintain and prove the issue, on his part gave in evidence, That, &c (here set out the evidence offered.) To which evidence the defendant (or plaintiff, as the case may be) by his counsel, objected as improper to go to the jury, whereupon the matter was referred to the court ; who being of opinion that the said evidence was proper to go to the jury, the defendant (or plaintiff, as the case may be) by his counsel, excepted to such opinion, and prayed that these his exceptions might be sealed and enrolled, pursuant to the act of the General Assembly in that case made and provided ; and it is accordingly done.

☞ These exceptions must be signed by a majority of the justices present. *1 Rev. Code*, p. 44.

And where a paper was offered as a bill of exceptions to the opinion of the district court (two judges being present) and only signed by one judge, it was held not to operate as a bill of exceptions. *3 H. and M.* 219.



Bills of exceptions may also be taken for a misdirection in the judges or justices. See *Hargrave's Coke Littleton* 156. 3 *Bl.* 372.

This bill is to prevent the precipitancy of the judges, and ought to be allowed in all courts, and in all places of pleadings, and may be put in any time before the jury have given their verdict. *Trials p. fais* 229.

It must be tendered at the trial; and reduced to writing while the thing is transacting. *Bull. N. P.* 315.

If a judge allow the matter to be evidence, but not conclusive, and so refer it to the jury, no bill of exception will lie. *L. Raym.* 404, 405.

It ought to be upon some point of law, either in admitting or denying of evidence, or a challenge, or some matter of law arising upon facts not denied, in which either party is overruled by the court. *Bull. N. P.* 316.

If a bill be tendered, and the exceptions in it are truly stated, the judges ought to set their seals to it; but if the bill contain matters false, or untruly stated, or matters wherein the party was not overruled, they are not obliged to seal it. *Bull. N. P.* 316. 3 *Bl.* 372.

If the judge refuses to sign the bill, a writ on the statute may be awarded against him, commanding him to do it. If he returns that the facts are not truly stated, when they are, an action for a false return will lie, and if they are found true, damages will be given, and a peremptory writ commanding the same. 2 *Inst.* 426.

The party grieved may have a writ of error, and may assign error upon that bill sealed, and also in the record, or in one of them, at his pleasure. *F. N. B.* 21.

A bill of exceptions has been refused in criminal cases. (1 *Lev.* 68. *Keyling.* 15. 1 *Sid.* 84.) But it has been allowed in an indictment for a trespass. (1 *Lem.* 5.) Also in an information in nature of a *quo warranto*. 1 *Vent.* 366. See also, *Haw. B.* 2. c. 46, sect. 1.

### *Demurrer to evidence.*

A. P. }  
v. } In debt (case, &c. as the action is.)  
B. D. }

The plaintiff, by his counsel in this cause, produces in evidence to the jury, to prove and maintain the issue joined on his part, That, &c. (here state the evidence.) And the said defendant says, that the aforesaid matters to the jurors aforesaid, in form aforesaid, shewn in evidence by the said plaintiff, is not sufficient in law to maintain the said issue joined, on the part of the said plaintiff, and that he the said defendant to the matter aforesaid shewn in evidence hath no necessity, nor is he obliged by the laws of the land to answer; and this he is ready to verify. Wherefore, for want of sufficient matter in that behalf shewn in evidence to the jury aforesaid, the said defendant prays judgment, and that the jurors aforesaid be discharged from giving any verdict upon the said issue, &c. and that the plaintiff be barred of having a verdict, &c.

### *Joinder in Demurrer.*

And the said plaintiff saith, that he hath given sufficient matter in evidence, to which the defendant hath given no answer, &c. and de-

mands judgment, and that the jury be discharged, and that the defendant be convicted, &c.

A demurrer to evidence admits the truth of all facts, which, upon the evidence stated, *might* be found by the jury in favour of the party offering the evidence. *Doug.* 133.

The judgment on a demurrer to evidence is, *that the evidence was or was not sufficient to maintain the issue.* *Doug.* 223. *Bull. N. P.* 315.

When evidence is demurred to, the jury may assess the damages conditionally. If they do not, and judgment on the demurrer is given for the plaintiff, there shall be a writ of inquiry; and after the execution thereof the defendant may take advantage of any objection to the declaration, by moving in arrest of judgment, or bring a writ of error, *Doug.* 223.

If one demur properly, the other ought to join. *Bull. N. P.* 313.

• For the form of *summons* for witnesses, see title 'WITNESSES.'

## EXAMINATION.

1. If upon the examination of a prisoner, it manifestly appears that no such crime as that with which he is charged was committed, or that the suspicion entertained of the prisoner was wholly groundless, in such cases only it is lawful totally to discharge him. Otherwise he must either be committed to prison, or give bail; that is, put in securities for his appearance to answer the charge against him. *4 Bl. Com.* 296.

2. If by some reasonable occasion, the justice cannot at the return of the warrant take the examination, he may by word of mouth command the constable, or any other person, to detain in custody the prisoner till the next day, and then to bring him before the justice for further examination. And this detainer is justifiable by the constable or any other person, without shewing the particular cause for which he was to be examined, or any warrant in writing. *1 Hale* 585.

3. But the time of the detainer must be reasonable, therefore the justice cannot justify the detainer of such a person sixteen or twenty days, in order to such examination. (*1 Hale* 586.) And three days have been held the utmost time allowed for the above purpose. *Cro. Eliz.* 829.

• The examination of prisoners, and witnesses, in pursuance of the stat. of 2 & 3 *Ph. & Mar.* c. 10, is not recognized in Virginia. See *4 Tuck. Bl.* 296, note 1, and title 'CRIMINALS.'



## EXECUTION.

1. EXECUTION is the last step after final judgment; or the putting the sentence of the law in force. (3 *Bl. Com.* 412.) By some it is called the *life of the law*; by others the *end of the law*.

2. Executions are of various kinds. 1. *Habere facias seisinam*, or writ of seizing of a freehold. 2. *Habere facias possessionem*, or writ of possession of a chattel interest. These are for the actual possession of lands recovered; and in the execution of them the sheriff may take the *posse comitatus*, and break open doors, if the possession be not quietly delivered. (3 *Bl. Com.* 412.) 3. Where some special thing is to be done or rendered by the defendant; as, upon a judgment for the removal of a nuisance, a writ goes to the sheriff to abate it at the charge of the party: or, in replevin, the writ *de retorno habendo*, and if the distress be eloiigned, a *capias in withernam* for the defendant; but on the plaintiff's tendering the damages, and submitting to a fine, the process in *withernam* shall be stayed; or a *distringas*, in detinue for the specific thing recovered; or else a *scire facias* against any third person in whose hands it may be. (3 *Bl. Com.* 413. 4. A *capias ad satisfaciendum* (called a *ca. sa.*) to imprison the body of the debtor till satisfaction be made for the debt, costs and damages. (3 *Bl. Com.* 414.) 5. A *feri facias* (called a *fi. fa.*) which is an execution against the goods, including a lease for years. (3 *Bl. Com.* 417.) 6. A *levari facias*, which affects a man's goods, and the *profits* of his lands. (3 *Bl. Com.* 418.) 7. An *elegit*, by which the defendant's goods and chattels (except oxen and beasts of the plough) are delivered to the plaintiff, by appraisement; and if they be insufficient, then one half his freehold lands, whether held in his own name or by any other in trust for him, are delived, till out of the rents the debt be paid, or the defendant's interest expire. (3 *Bl. Com.* 418.) 8. A *venditioni exponas*, concerning which. see 1 *Rev. Code*, p. 299, sect. 19. *Ibid.* p. 425.

3. The sheriff may not break open any outer door to execute a *ca. sa.* or *fi. fa.* but must enter peaceably, and then may break open any inner door belonging to the defendant. 3 *Bl. Com.* 417.

4. By the laws of *Virginia*, where a *ca. sa.* is served on a debtor, he may relieve his body by giving up property to the sheriff. (See 1 *Rev. Code*, p. 301, sect. 29.) This principle was very early engrafted into our laws. See *act XI.* of February, 1644-5. *Stat. at Large*, vol. 1. p. 294. And *act VIII.* of November, 1647. *Ibid.* p. 346.

5. If the plaintiff take out no execution on his judgment for a year and a day, he cannot afterwards sue out execution, without a *scire facias*. See *Tidd's Prac.* (Riley's edit. 1999, &c.

6. But where a *fi. fa.* or *ca. sa.* is taken out within the year, and not

executed, a new writ of execution may be sued out at any time afterwards, without a *scire facias*. *Co. Lit.* 290. b. *Tidd's Prac.* 1003.

7. So, if there be a judgment, with a *stay of execution*, the plaintiff may take out execution, after a year from the date of the judgment; provided it be within a year from the time to which the execution was stayed. *Tidd's Prac.* 1005.

8. So, if the defendant bring a writ of error, and thereby hinder the plaintiff from taking out execution within the year, and the judgment be affirmed, the plaintiff in error nonsuited, or the writ of error abated or discontinued, the defendant in error may proceed to execution after the year, without a *scire facias*. *Ibid.*

9. So, if the plaintiff be delayed by injunction in chancery, he may (contrary to the old opinions) sue out execution, after the year. *2 Burr.* 660.

10. The former practice was, that if the judgment was under seven years old, the plaintiff might sue out a *scire facias*, of course, without leave or motion; if above seven, but under ten, not without a rule of court; if above ten, but under twenty, there must be a motion, supported by affidavit, that the judgment is unsatisfied; and if above twenty, there must be a rule to shew cause, on similar affidavit. (*Tidd's Prac.* (Riley's edit.) 1007.) But by the laws of Virginia, a *scire facias*, or debt on a judgment, may be brought within ten years, and not after. (*1 Rev. Code*, p. 108, sect. 5.)

11. So, a motion may be made against a sheriff, or other officer, or his or their security, or securities, for not returning an execution, for ten years and not after. *1 Rev. Code*, p. 108, sect. 5.

12. A man in prison for criminal matter is not chargeable with a civil action, without leave of the court. (*1 Lill. Prac. Reg.* 763.) And though application ought to be made to the court, yet, if he be once charged, he shall not be discharged. (*Ibid.* & *T. Raym.* 58.) So a *ca. sa.* may be executed on a prisoner suspected of felony; and after his trial and acquittal, the sheriff must detain him, or it will be an escape. *1 Lill. Prac. Reg.* 767.

13. Executions are well executed, though they are not returned, *4 Co.* 67. a.

14. If a man is in execution, and the jailor suffers him to escape, he is not discharged of the execution, but may be retaken. *1 Lill. Prac. Reg.* 765.

15. But after the defendant has been taken in execution upon a *ca. sa.* and discharged by the consent of the plaintiff, the action is at an end. *Lutw.* 1266. *4 Burr.* 2482.

16. If the plaintiff consent to discharge one of several defendants taken on a joint *ca. sa.* he cannot afterwards retake him, or take any of the others. *6 Term. Rep.* 525.

17. A separate *ca. sa.* against one defendant, on a joint judgment against two, cannot be supported. *Ibid.*

18. Husband and wife taken in execution for the debt of the wife, the wife shall be discharged, the husband being in execution; because the wife hath nothing to satisfy the execution with. *1 Lill. Prac. Reg.* 766. *1 Lev.* 51.

19. A *fi. fa.* may be executed after the death of the party against whom it was issued. *1 Lill. Prac. Reg.* 767.

20. On a *f. fa.* against one partner, the sheriff may take the goods of both, and the vendee shall have a moiety in common. *Ibid.* But see *Watson's Part.* 72 (98.)

21. Where two writs of execution are delivered to the sheriff on the same day, he must execute that which was first delivered. *Carth.* 419.

22. But if he executes the last first, the execution is good, but the sheriff is liable to the plaintiff in the first. 3 *Salk.* 320.

23. But where the plaintiff in an execution directs it not to be executed before a distant day, and in the mean time another execution comes, the sheriff is not to keep the first writ hanging over the head of other creditors, but is to levy under the last execution, as if no other had ever been delivered to him. *Peake's Ca. N. P.* 66.

☞ For more relating to executions in civil cases, see title 'SHERIFFS.'

### (A) Execution granted by a magistrate, against the goods.

The commonwealth of Virginia to the constable of                      district, in  
the county of                      greeting.

You are hereby commanded, that of the goods and chattels of A B, late in your district, you cause to be made the sum of                      which C D, lately before me (or J P, a justice of the peace for the county aforesaid) hath recovered against him for † *debt*; also                      cents for costs, \* whereof the said A B is convicted, by my judgment (or as appears by the judgment of J P, &c.) and that you make return of this precept within *sixty* days. Witness J P, a justice of the peace for the county aforesaid, this                      day of                      in the year

☞ An execution cannot be issued by a justice of the peace against the *body* of the defendant. See 1 *Rev. Code*, p. 84, sect. 6.

☞ The return must be according to the truth of the case: as 'No effects,' 'Ready to satisfy,' &c.

### (B) Execution, in trover.

(Pursue form (A) to this mark †, then, instead of the word 'DEBT,' say) 'damages, in a certain action of trover and conversion.' (Conclude as in form (A).)

### (C) Execution, in detinue.

(As in form (A) omitting the word 'DEBT,' and instead thereof, saying: 'damage, in a certain action of detinue.' (Conclude as in form (A).)

☞ The proper process of execution in detinue, founded on the judgment of a court, is a *distringas*; the effect of which is to distrain the defendant by his lands and chattels, so that neither he, nor any one by him, lay his hands on them, until he render the *specific thing* recovered. (See *Tidd's Appendix* (Riley's edit.) 257, sect. 9.) But as our act of Assembly, which gives jurisdiction to a single magistrate in cases of *trover* and *detinue*, only authorises judgment 'for the value of the subject in controversy, with *damages* and *costs*,' and an ex-

ecution 'against the goods and chattels' of the defendant, a *distringas* would be improper. See 2 Rev. Code, p. 114.

(D) *Execution, where the warrant was dismissed at the plaintiff's costs.*

(As in form (A) omitting what is between these marks † \*, and instead of which, saying 'his costs, in defending a certain warrant brought by the said A B against the said C D.' (Conclude as in form (A).)

(E) *Execution on a judgment for costs only, against the defendant.*

(As in form (A) omitting what is between these marks † \*, and instead of which, saying) 'his costs in prosecuting a certain warrant against the said A B.' (Conclude as in form (A).)

*Of the execution of a Criminal.*

1. Where a person attainted hath been at large, after his attainder, and afterwards is brought into court, and demanded why execution should not be awarded against him, if he deny that he is the same person, it shall be immediately tried by a jury returned for that purpose. Haw. B. 2. c. 51. sect. 3.

2. The court may command execution to be done without any writ. *Ibid.* sect. 4.

3. In fixed and stated judgments, the law makes no distinction between a common and an ordinary case, and one attended with extraordinary circumstances; for which reason it hath been adjudged that the court could not order the hand to be cut off, or the body to be hung in chains. Haw. B. 2. c. 48. sect. 2.

4. But the execution of the judgment may be pardoned in part; as where the judgment is hanging, beheading, emboweling, and the like; all may be pardoned but the beheading, whereby the judgment is not altered, but part of it remitted. 2 Hale 412.

5. It is clear, that if a man condemned to be hanged come to life, he shall be hanged again, for the judgment was not executed till he was dead. Haw. B. 2. c. 51. sect. 7.

6. None but the proper officer can execute the judgment of the court. *Ibid.* sect. 6.

7. A woman sentenced to death may plead her being quick with child, in order to respite execution; and if found so by a jury of matrons, summoned by the sheriff, execution shall be respited till her delivery; but she shall have this privilege but once. *Ibid.* sect. 9.

## EXTORTION.

EXTORTION, in a large sense, signifies any oppression under colour of right; but in a strict sense, it signifies the taking of money by any officer, by colour of his office, either where none at all is due, or not so much is due, or where it is not yet due. *Haw. B. 1. c. 68. sect. 1.*

Justices of the peace are bound, by their oath of office, to take nothing for their official proceedings. And generally, no public officer shall take any other fee or reward for doing any thing relating to his office, than some law in force gives him; and officers doing otherwise are guilty of extortion. *Dalt. c. 41.*

It has often been resolved, that a promise to pay them money for doing of any thing, which the law will not suffer them to take any thing for, is merely void. *Haw. B. 1. c. 68. sect. 4.*

### *Punishment.*

At the common law, this offence is severely punishable, at the suit of the commonwealth, by fine and imprisonment, and also by removal from the office, in the execution whereof it was committed. *Haw. B. 1. c. 68. sect. 5.*

‘No treasurer, keeper of any public seal, councillor of state, counsel for the commonwealth, judge, clerk of the peace, sheriff, coroner, escheator, nor any officer of the commonwealth, shall take any manner of reward for doing his office, other than is allowed by law. And he that doth, shall pay to the party grieved, the treble value of that he hath received, shall be amerced and imprisoned at the discretion of a jury, and discharged from his office forever. Any person may sue for himself and the commonwealth, and shall have the third part of the amercement.’ 1 *Rev. Code* 59. sect. 1. p. 56.

‘If any clerk of a court shall knowingly and fraudulently charge, demand, exact, or take more for any business by him done, than is allowed by law, or shall knowingly and fraudulently charge, demand, exact or take any fee for business not actually done, every clerk, so offending, shall be held guilty of extortion, and on conviction thereof in the general court, by indictment or information, shall be amerced at the discretion of a jury, and shall be discharged from his office forever.’ 2 *Rev. Code*, p. 86. sect. 4.

‘Every commissioner in chancery, for asking, demanding, or receiving any other or further fees, for services performed, than those allowed by law, or for asking, demanding or receiving any fees for services not performed, shall be liable to the same penalties and proceedings as clerks of courts are liable to in like cases. 2 *Rev. Code*, c. 103. sect. 7. p. 150.



*(A) Indictment against a coroner for extortion.*

county, to wit:

The jurors for the commonwealth, &c. upon their oath present, that W N, late of the parish of S, in the county of            gent. (the said parish of S being the usual place of abode of him the said W N) on the            day of            in the            year of the commonwealth, &c. then being one of the coroners of the said commonwealth for the county of            at the parish aforesaid, in the county aforesaid, by colour of his said office, unlawfully and unjustly did demand, extort, receive, and take of and from one R S, the sum of            dollars, of lawful money of this commonwealth, for and as his fee, for executing and doing of his office aforesaid, to wit, upon the view of the body of one J C, late of            in the said county of            glazier, who at the parish of S, aforesaid, in the county aforesaid, on the day and year above mentioned, was slain by misadventure, and there lay dead, in contempt of the laws of this commonwealth, to the great damage of the said R S, against the form of the statutes in such case made and provided, and against the peace and dignity of the commonwealth.

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## FALSE NEWS.

THE law, punishing *divulgers of false news*, is of very ancient date. It first passed at the *March session*, 1657-8, during the time of *Oliver Cromwell*, and was intended, as the act itself declares, to preserve the peace of the government of Virginia, as settled by the articles of surrender. (See *Stat. at Large*, vol. i. p. 434.) It was re-enacted in the revival of 1661, with but few variations, and has been continued in every revival since.

“What person or persons soever shall forge or divulge any false reports, tending to the trouble of the country, he shall be by the next justice of the peace sent for, and bound over to the next county court; where, if he produce not his author, he shall be fined forty dollars (or less, if the court think fit to lessen it) and besides give bond for his good behaviour, if it appear to the court that he did maliciously publish or invent it.” 1 *Rev. Code*, p. 209.

FALSE TOKEN. See CHEAT.

FELONY. See HOMICIDE.

# FELONY, MISPRISION OF FELONY, AND THEFTBOTE.

## I. FELONY.

SO various are the derivations of the word *felony*, that it would be an useless task to undertake a recital of the different opinions of writers on the subject. Suffice it to observe, in the words of judge *Blackstone*, that "Felony, in the general acceptation of the English law, comprises every species of crime, which occasioned at common law the forfeiture of lands or goods." 4 *Bl. Com.* 95.

## II. MISPRISION OF FELONY.

Misprision of felony (from the French word *mespris*) a neglect or contempt (3 *Inst.* 36.) is the concealing of a felony which a man knows, but never consented to; for if he consented, he is either a principal or accessory in the felony, and consequently guilty of misprision of felony and more. 1 *Hale* 374.

For it is said, that every felony includes misprision of felony, and may be proceeded against as a misprision only. 1 *Haw.* 125.

If any person will save himself from the crime of misprision, he must discover the offence to a magistrate, with all convenient speed that he can. 3 *Inst.* 140.

Misprision, in a larger sense, is used to signify every considerable misdemeanor, which hath not a certain name given it by the law. 2 *Burn's Just.* 172.

This offence is usually punished by fine and imprisonment.

## III. THEFTBOTE.

*Theftbote* (from the Saxon words *theft*, and *bote boot*, or *amends*) is, where one not only knows of a felony, but takes his goods again, or other amends, not to prosecute. 1 *Haw.* 125.

But the bare taking of one's own goods again, which have been stolen, is no offence, unless some favour be shewn to the thief. 1 *Haw.* 125.

This offence is very nearly allied to felony, and is said to have been anciently punished as such; but at this day it is punishable only with ransom and imprisonment, unless it were accompanied with some degree of maintenance given to the felon, which makes the party an accessory after the fact. *Ibid.*

*Warrant for felony.*

county, to wit:

Whereas A I, of                    hath this day made information and complaint, upon oath, before me, J P, a justice of the peace for the county of                    that this present day, divers goods of him the said A I, to wit (*describe them*) have been feloniously stolen, taken, and carried away, from the house of him the said A I, at the county aforesaid, and that he hath just cause to suspect, and doth suspect that A O, late of                    did feloniously steal, take, and carry away the same. These are therefore to command you, forthwith, to apprehend the said A O, and to bring him before me, to answer the said information and complaint, and further to be dealt with according to law. Given under my hand and seal, &c.

To the constable of

☞ The comprehensive term *Felony* would naturally embrace a great variety of heads, such as *Homicide, Robbery, Burglary, Rape, Forgery, Larceny, &c.* But as all felonies are treated of under their respective titles, and the method of bringing the offender to justice may be found under titles *Criminals, Arrest, Hue and Cry, Bail, Commitment, Jail and Jailor, Arraignment, Indictment, Mute, Confession, Juries and Jurors, Evidence, Clergy, Judgment, and Execution*, it would be an unnecessary repetition to insert any matter in this place, relative to these several titles.

FEME COVERT. See WIFE.

## FENCES.

"IF any horses, mares, cattle, hogs, sheep, or goats, shall break into any grounds inclosed with a strong and sound fence, five feet high, and so close that the beasts could not creep through; or with an hedge two feet high, upon a ditch three feet deep, and three feet broad; or instead of such hedge, a rail fence of two feet and a half high, the hedge or fence being so close that none of the said creatures can creep through, which shall be accounted a lawful fence, the owner of such creatures shall, for the first offence, make reparation to the party injured, for the true value of the damage, and for every subsequent trespass double damages; to be recovered with costs in any court of record: for a third offence, the party injured may either kill the beast, without being liable to an action, or may sue for his damages." 1 *Rev. Code*, 273.

2. "Upon complaint made to a justice for the county, wherein such trespass shall be, such justice shall, without delay, issue his order, to three honest and disinterested house-keepers, reciting the complaint, and requiring them to view the fence where the trespass is complained of, and to take memorandums of the same, and their testimony in



such case shall be good evidence to the jury, touching the lawfulness of the fence."

3. "If any person damnified, for want of such sufficient fence, shall injure, or cause to be injured, in any manner, any of the kind of animals above mentioned, he shall pay to the owner double damages, with costs, recoverable as aforesaid."

*Warrant to three housekeepers to view the fence:*

county, to wit:

To A H, B H, and C H, housekeepers of this county.

Whereas J K, of the said county, planter, hath this day complained to me, J P, a justice of the peace for the county aforesaid, that a horse belonging to W N, of the said county, did last night break into the corn field of the said J K, which was fenced and inclosed according to the directions of the act of the General Assembly in that case made and provided, whereby he hath sustained considerable damage. These are therefore to require you, forthwith, to go and view the fence of the said cornfield, and take a memorandum of the same in writing, the better to enable you to testify, if you should be required, concerning the premises. Given, &c.

## FERRIES.

FERRIES were originally established, in Virginia, at the expence of the county where they were kept; and where a river or creek was the dividing line between two counties, each of them was bound to contribute. (See 1 vol. *Stat. at Large*, p. 269.) In the year 1647, that act was repealed, and the county courts were authorised to establish ferries, on the application of individuals, and to fix their rates. (*Ibid.* p. 348.) Afterwards the General Assembly exercised the sole power of establishing ferries; until, by an act passed at the session of 1806, power was again given to the county courts. See 2 *Rev. Code*, p. 150.

So much of the several acts concerning ferries, as fall within the jurisdiction of a justice of the peace, will be found in 1 *Rev. Code*, p. 227, sect. 4. and 2 *Rev. Code*, p. 152, sect. 7, 8. By the first recited act, if the keeper of a ferry or toll bridge shall demand and take from a person, a greater sum for ferriage than is allowed by that act, he forfeits to the person so overcharged the ferriage or toll, and two dollars. By the last mentioned act, if any keeper of a ferry, after due application, shall refuse to set over a person within a reasonable time, he shall forfeit two dollars, one half to the informer, the other to the poor of the precinct. *Provided*, that if it shall appear to the justice that, from the cause of wind, rise of water, driving of ice, or other good

cause in the water course, that the life of the owner or keeper would have been in danger, he shall be discharged.

*(A) Warrant for exacting more than legal ferriage.*

county, to wit :

Whereas A T hath this day made complaint to me, J P, a justice of the peace for the county aforesaid, that B F, the owner of a ferry \* (or toll bridge) over river (or creek) did demand and take of him the sum of for crossing the same, being a greater sum than allowed by law. These are therefore to command you to summon the said B F to appear before me, immediately, to shew cause why the said two dollars, besides the said sum of should not be levied upon him. Given under my hand and seal, &c.

*(B) Warrant for refusing to set a person over a ferry.*

(As in form (A) to this mark \*, then say) did refuse to set the said A T over the said ferry, not having a reasonable excuse. These are therefore, &c. to shew cause why the penalty of two dollars should not be levied, &c. Given, &c.

## FLOUR.

THE exportation of flour having become an article of considerable importance in this state, the legislature have found it necessary to enforce obedience to the several requisitions of the act for "regulating the inspection of flour and bread," by imposing certain penalties, many of which are recoverable before a justice of the peace.

By act of 1792 (1 Rev. Code, p. 228, after enumerating the several places at which inspections of flour and bread shall be established) it is enacted, sect. 3. That the courts of the several counties in which those places are situated shall annually, in September or October, appoint a person of good repute, and skill in the quality of flour, as inspector. In case of the death, refusal, or neglect, of a person so appointed, the justices of the county, or any three, may fill the vacancy, by appointment of another till the next court, when another appointment shall be made for the balance of the year. The court failing to appoint at the time directed, the governor and council may, and the person appointed, after taking the oath herein after mentioned, before a justice of the peace, shall in every instance be considered as appointed by the court.

Sect. 4. All wheat flour, brought to any inspection for exportation, shall be merchantable, of due fineness, and without any mixture of

the flour of any other grain [under penalty of forfeiture to the commonwealth, and ten dollars a barrel.] 1 *Rev. Code*, p. 263, 430.

Sect. 5. All bread and flour casks, for exportation, shall be well made, of seasoned materials, tightened with ten hoops, nailed with four nails in each chine hoop, and three nails in each upper bilge hoop; the flour barrels shall be twenty-seven inches in length in the staves, and seventeen and a half in the head in diameter; half barrels shall be twenty-three inches in length, and twelve and a half inches in the head in diameter.

Sect. 6. Every miller of flour and baker of bread shall brand every cask for exportation, with a distinguishable brand-mark, and mark the tare and nett weight, before removed from the place of manufacture, under a penalty of forty-two cents for every cask of flour not nailed and hooped as aforesaid, and for every cask of flour or bread, not branded and marked as aforesaid, to be recovered from the miller or baker; or from the person bringing them to market, who may recover it again from the miller or baker, provided he can prove he gave them notice he intended to carry it away for exportation. [Every barrel of flour to be branded No. 2.] 1 *Rev. Code*, p. 377.

Sect. 7. Every barrel of flour shall contain one hundred and ninety-six pounds, and every half barrel ninety-eight pounds of flour; for the deficiency of every pound under three, the miller and bolter forfeits eight cents, and more than three, seventeen cents. [The fine imposed on the person offering the flour for inspection.] *Ibid*.

Sect. 8. All casks wherein bread shall be packed shall be weighed, and the tare marked thereon. And if any person shall put a false or wrong tare on, to the disadvantage of the purchaser, he shall forfeit, for every cask so falsely tared, eighty-three cents; and the inspector, his deputy or assistant, upon suspicion, or at the request of the purchaser, shall unpack any cask of flour or bread; and if there is a less quantity of flour, than above directed, or if the cask wherein bread is packed shall be found to weigh more than is marked thereon, the miller, baker or bolter, shall pay the charges of unpacking, and re-packing, over and above the penalties aforesaid; but otherwise the charges shall be paid by the inspector, or by the purchaser, if the trial be made at his request. [Extended to flour.] 1 *Rev. Code*, p. 311.

Sect. 9. Every baker of bread for exportation shall deliver with it a manifest of the contents, with his brand marked thereon, and his name subscribed thereto, under the penalty of seven dollars for every manifest delivered contrary thereto; and if, on trial, any cask of bread be found lighter than it is specified in the manifest, the baker forfeits in the same proportion as is directed in the case of flour.

Sect. 10. Any cask of flour, brought to an inspection for exportation, shall be examined by an inspector, by boring through the head of the cask, with an instrument not exceeding half an inch in diameter: if he shall judge it merchantable, agreeable to the directions of this act, he shall plug up the hole, and brand the cask in the quarter, with the name of the place at which he is inspector, with a public brand-mark, to be provided for him, and also the degree of fineness, as *superfine, fine, middling, shipstuff*; for which the inspectors at Alexandria, Fredericksburg, Falmouth, Richmond, Manchester, Petersburg, Poca huntas, and Blandford, shall receive two cents for each

cask; at all other inspections three cents. Unmerchantable flour, according to the meaning of this law, shall be marked on the bidge, by the inspector, with the word 'condemned,' or may be secured for further examination, to be made within twenty days, and the inspector shall receive from the owner, the same rate and prices as if it had passed. A person dissatisfied with the judgment of an inspector may apply to a justice, who shall issue his warrant to three indifferent persons, well skilled in the manufacture of flour, to view and examine the same; who, having taken the oath hereinafter directed for an inspector, shall view and examine the same; and if they, or two of them, think it merchantable, the inspector shall erase the word 'condemned,' and put such brand on as they or any two shall direct, and repay to the complainant his costs; but if the judgment of the inspector be confirmed, the owner shall pay the costs of the review, and the inspector three cents for each cask. A person lading on board any vessel, for exportation, any cask of flour marked 'condemned,' or not inspected, and branded, as directed by law, forfeits ten dollars for each cask exported, or laden for exportation. [The same right of appeal is given from the judgment of an inspector, in relation to the degree of *fineness*, by act of 1809.]

Sect. 11. A person packing flour or meal in a cask, which has been inspected and branded with the name of a miller, forfeits twenty dollars each cask, recoverable by petition and summons, one half to the use of the informer, and the other to the miller who has been injured by such packing, and is liable to the action of the party aggrieved.

Sect. 12. Where any mill is situated on navigable water, below the falls, the owner may require the inspector nearest thereto to attend and inspect the flour manufactured by him; and the inspector or his deputy shall attend and inspect the flour, in the same manner as if it had been brought to the inspector.

Sect. 13. Every inspector of flour before he enters upon the execution of his office shall make oath or affirmation.

"That he will, without favour, affection, malice, or partiality, carefully inspect all flour brought to him, and which he shall be required to examine; that no flour shall be passed or branded by him, without his inspecting the same; that he will not brand, or cause to be branded, as passed, any cask or casks of flour, that do not appear to him, to the best of his skill and judgment, to be sufficiently clean, well ground, sweet and merchantable; that he will mark on all casks of flour the degree thereof, according to the directions of this act; that he will carefully examine the casks in which flour brought for inspection shall be contained; and that he will not pass or brand any such casks, unless they be of such size, goodness and thickness, as by this act required."

Sect. 14. No inspector shall purchase any flour condemned, or of any other kind, except for his own use, under penalty of seven dollars for each barrel.

Sect. 15. If any person shall alter the mark stamped on any cask of flour by an inspector, or shall mark or brand any cask of flour, which has not been inspected, with any mark or brand similar to, or in imitation of an inspector's mark or brand, or after an inspector shall have passed any cask of flour as merchantable, shall pack into such cask

any other flour, or after any cask of flour shall be branded 'condemned,' shall unpack and re-pack the same in other casks for exportation, such person shall forfeit and pay the sum of seven dollars for every cask.

Sect. 16. Inspectors may appoint assistants, if they cannot alone examine all the flour brought with convenient dispatch, or shall be incapacitated through sickness; the assistant shall take the same oath as directed for an inspector, and shall be authorised to act as such.

Sect. 17. The courts of the several counties in which an inspection is situated may at any time remove from office any inspector of flour, for neglect, malfeasance, or corrupt practices, and may supply the vacancy, by appointing another for the residue of the year.

Sect. 18. Where the penalties in this act do not exceed five dollars, they may be recovered before a single magistrate; where they are over that sum, and do not exceed twenty dollars, by petition; and where they exceed twenty dollars, by action in the county where the defendant resides, or where the offence was committed: and the prosecutor may make oath before a justice of the peace, of the nature of the action, and that he verily believes the defendant hath incurred the penalty and forfeiture thereby demanded, which the clerk, upon a certificate thereof to him produced, shall indorse upon the back of the writ, and the defendant shall be ruled to give special bail. [None of the penalties to go to the informer, if he be an inspector.] 1 Rev. Code, p. 377.

"That part of the penalties which is to go to the use of the commonwealth shall be paid to the inspector at the place where the offence shall be discovered, who shall annually, to the court of his county, held in the month of September, render a fair and just account thereof upon oath, a copy whereof shall be certified by the said court, and being so certified, shall be by their clerk transmitted to the auditor of public accounts, who shall debit the inspector therewith, and the inspector shall annually pay the amount thereof, deducting *six per cent.* into the public treasury, on or before the first day of January, in each year; and in case of failure, may be proceeded against in the same manner as delinquent sheriffs." 1 Rev. Code, p. 311.

*(A) Warrant against a miller, or persons bringing flour to an inspection, under sections 5 and 6.*

county or corporation of                      to wit:

To the constable of the said county (or, of the corporation of

Whereas information, on oath, hath this day been made to me, J P, one of the justices of the peace for the county (or corporation) aforesaid, by A J, that A O, of the county of                      hath brought to this place for exportation                      casks of flour, which are not well made of good seasoned materials, tightened with ten hoops, sufficiently nailed with four nails in each chine hoop, and three nails in each upper bilge hoop, agreeably to the act of the General Assembly, in that case made and provided. These are therefore to require you to summon the said A O to appear before me, or some other justice of the peace for the county (or corporation) aforesaid, to shew cause why the penalty

of forty-two cents for each cask of flour, as aforesaid, should not be levied upon him according to law. Given under my hand, &c.

If for any other offence against the above sections, the warrant may be in the same form, except in the description of the offence, which must vary to suit the case.

### *Judgment.*

Upon hearing the testimony, it appears to me, that the within-mentioned casks of flour, to the number of                    are not nailed and hooped, as required by the act of the General Assembly, in that case made and provided, therefore it is considered that the said A O do forfeit and pay the sum of                    being the sum of forty-two cents for each cask of flour, not nailed and hooped as required by law. Given under my hand, &c.

J P.

### *(B) Warrant, on section seven.*

(As in warrant (A) to the word flour) which do not contain the quantity of one hundred and ninety-six pounds of flour, as required by the act of the General Assembly, in that case made and provided. These are, &c. to shew cause why the penalty of eight cents for each pound of flour under three, and of seventeen cents for each pound over three, of which each barrel falls short of the said quantity required by law, may not be levied on the said A O. Given, &c.

### *(C) Warrant on section eight, and on section one, of chap. 155, of the Revised Code.*

(As in warrant (A) to the word flour) (or bread) on each of which casks the tare is falsely marked. These are therefore, &c. to shew cause why the penalty of eighty-three cents should not be levied on the said A O, for each cask so falsely tared, according to law. Given, &c.

### *(D) Warrant to three indifferent persons, to review flour condemned by an inspector.*

county, to wit:

To A J, B J, and C J.

Whereas A C, of the county of                    hath this day complained to me, J P, a justice of the peace for the county of                    aforesaid, that through the ill judgment and want of skill in B J, an inspector of flour at                    barrels of flour, brought by the said A C to the said place for exportation, have been condemned as unmerchantable, and the said A C, being desirous to have a review of the same according to law. These are therefore to require you, having first taken the oath required by the act of the General Assembly, entitled "An act reducing into one the several acts for regulating the inspection of flour and bread," to view and examine the said



barrels of flour, and if you, or any two of you, shall think the same to be merchantable, that you cause the said inspector to erase the word 'condemned,' and to put such brand on the said flour as you, or any two of you, shall direct; distinguishing the degree, as directed in the tenth section of the above recited law. And you, the said inspector, are hereby required to pay due obedience to the injunctions contained in this warrant, so far as the same respects the acts to be done by you. Given, &c.

☞ If the appeal be from the judgment of an inspector, as to the degree of fineness, the warrant must vary to suit the case.

## FORCIBLE ENTRY & DETAINER.

THIS offence is committed by violently taking or keeping possession of lands and tenements, with menaces, force, and arms, and without the authority of law. This was formerly allowable to every person disseised, or turned out of possession, unless his entry was taken away or barred by his own neglect, or other circumstances. But this being found very prejudicial to the public peace, it was thought necessary, by statute, to restrain all persons from the use of such violent methods, even of doing themselves justice; and much more, if they have no justice in their claim. So that the entry now allowed by law is a peaceable one; that forbidden is such as is carried on and maintained with force, with violence, and unusual weapons. 4 Bl. Com. 147.

However, even at this day, in an action of forcible entry, grounded on those laws, if the defendant make himself a title which is found for him, he shall be dismissed without an inquiry into the force; for however he may be punishable *at the suit of the commonwealth*, for doing what is prohibited by statute, as a contemner of the laws, and disturber of the peace, yet he shall not be liable to pay any damages for it to the plaintiff, whose injustice gave him the provocation in that manner to right himself. 1 Hawk. 141.

*I. What is a forcible entry and detainer. II. How they are punishable by action at law. III. How punishable by indictment. IV. How punishable by a justice, sheriff, mayor, &c. V. How punishable on a certiorari. VI. How punishable as a riot. VII. Precedents.*

### I. WHAT IS A FORCIBLE ENTRY AND DETAINER.

"None shall make any entry into any lands and tenements, or other possessions whatsoever, but in case where entry is given by law; and in such case not with strong hand, nor with multitude of people, but only in a peaceable and easy manner, and that none who shall have

entered into the same in a peaceable manner, shall hold the same afterwards with force; and if any shall do to the contrary, on complaint thereof to any justice or justices of the peace, such justice or justices shall take sufficient power of the county, and go to the place where such force is made; and all the people of the county, as well the sheriff as others, shall be attendant on the same justices, to go and assist them to arrest such offenders, upon pain of imprisonment and amercement, at the discretion of a jury.' 1 Rev. Code, p. 151. from 5 Rich. 2. c. 8. & 15. R. 2. c. 2.

The term '*possessions*' is thought not to extend to a *way, common, office, &c.* 1 Haw. 146.

*Not with strong hand, nor with multitude of people.....* It seems certain, that if one who pretends a title to lands barely go over them, either with or without a great number of attendants, armed or unarmed, in his way to the church or market, or for such like purpose, without doing any act, which, either expressly or impliedly, amounts to a claim of such lands, he cannot be said to make an entry thereon. 1 Haw. 144.

But it seems that if a person enter into another man's house or ground, either with apparent violence offered to the person of any other, or furnished with weapons, or company, which may excite fear, though it be but to cut or take away another man's corn, grass, or other goods, or to fell or crop wood, or do any other trespass, and though he do not put the party out of his possession, yet it seems to be a forcible entry. *Dall. ch. 126.*

But if the entry were peaceable, and after such entry made, they cut or take away any other man's corn, grass, wood, or other goods, without apparent violence or force, though such acts are counted a disseizing with force, yet they are not punishable as forcible entries. *Ibid.*

But if he enters peaceably, and there shall, by force or violence, cut or take away any corn, grass, or wood, or shall forcibly or wrongfully carry away any other goods there being, this seemeth to be a forcible entry, punishable by these statutes. *Ibid.*

So also shall those be guilty of a forcible entry, who, having an estate in land by a defeasible title, continue with force in the possession thereof, after a claim made by one who had a right of entry thereto. 1 Haw. 145.

But he who barely agrees to a forcible entry made to his use, without his knowledge or privity, shall not be adjudged to make an entry within the statute. *Ibid.*

And, in general, it seems clear that to denominate the entry forcible, it ought to be accompanied with some circumstances of actual violence or terror; and that an entry which hath no other force than such as is implied by the law, in every trespass whatsoever, is not within these statutes. *Ibid.*

As to the matter of *violence*, it seems to be agreed that an entry may be forcible, not only in respect of a violence actually done to the person of a man, as by beating him, if he refuse to relinquish his possession, but also in respect of any other kind of violence in the manner of the entry, as by breaking open the doors of a house, whether any person be in it or not, especially if it be a dwelling-house, and perhaps



also, by an act of outrage after the entry, as by carrying away the party's goods; but it seems that an entry is not forcible by a bare drawing up the latch, or pulling back the bolt of a door, there being no appearance therein of its being done by *strong hand, or multitude of people*. And it hath been holden, that an entry into a house through a window, or by opening a door with a key, is not forcible. 1 *Haw.* 145.

In respect of the circumstances of *terror*, it is to be observed, that wherever a man, either by his behaviour or speech, at the time of his entry, give those who are in possession just cause to fear that he will do them some bodily hurt, if they will not give way to him, his entry is esteemed forcible, whether he cause such a terror, by carrying with him such an unusual number of attendants, or by arming himself in such a manner, as plainly intimates a design to back his pretensions with violence, or by actually threatening to kill, maim, or beat those who shall continue in possession, or by giving out such speeches as plainly imply a purpose of using force; as, if one say that he will keep his possession in spite of all men, or the like. 1 *Hawk.* 145.

But it seems that no entry shall be adjudged forcible from any threatening to spoil another's goods, to destroy his cattle, or to do him any other such like damage, which is not personal. 1 *Haw.* 146.

However, it is clear, that it may be committed by a single person as well as by twenty. *Ibid.*

But nevertheless, all those who accompany a man when he makes a forcible entry shall be adjudged to enter with him, whether they actually come upon the lands or not. 1 *Haw.* 144.

It seems certain that the same circumstances of violence or terror, which will make an entry forcible, will make a detainer forcible also; and a detainer may be forcible, whether the entry were forcible or not. 1 *Haw.* 146.

## II. HOW THEY ARE PUNISHABLE BY ACTION AT LAW.

The statute of England of 8 *Hen.* 6. c. 9. sect. 6. gave to the party injured a recompence by treble damages; but as that remedy is not recognized by our laws, the party seems to be left to his action at common law.

## III. HOW PUNISHABLE BY INDICTMENT.

This offence being also of a public nature, may be punished by indictment at the suit of the commonwealth. See *Dalt.* c. 129. 1 *Hawk.* 147.

And the tenement in which the force was made must be described with convenient certainty, and must set forth that the defendant actually entered and ousted the party grieved, and continueth his possession at the time of finding the indictment; otherwise he cannot have restitution, because it doth not appear that he needeth it. 1 *Haw.* 147, 149, 150.

But if a man's wife, children, or servants, do continue in the house, or upon the land, he is not ousted of his possession; but his cattle being upon the land do not preserve his possession. *Dalt.* ch. 132.

An indictment for forcible entry was quashed for not setting forth

that the party was seized or disseized, or what estate he had in the tenement; for if he had only a term of years, then the entry must be laid, into the freehold of A, in the possession of B. 3 *Salk.* 169

Tenants for years, and by *elegit*, shall have the same remedy as those holding estates of freehold or inheritance. 1 *Rev. Code*, p. 152. sect. 8.

#### IV. HOW PUNISHABLE BY A JUSTICE, SHERIFF, MAYOR, &c.

The same power which is given to *justices of the peace*, and *sheriffs*, in their counties, is also granted to *mayors*, *aldermen* and *serjeants*, within their cities. 1 *Rev. Code*, p. 152. sect. 6.

No warrant of forcible entry, &c. shall be granted, without the oath or affirmation of the party praying it. *Ibid.* p. 151. sect. 2.

The names of the persons so charged shall be inserted in every such warrant; to which persons the sheriff or officer shall give three days notice of the time and place of taking the inquisition. Without such notice, no jury shall be sworn to inquire of a forcible entry, &c. *Ibid.* p. 152. sect. 3.

Whether the persons making such entries be present or departed before the coming of the justices, they may proceed in some convenient place, at their discretion, to inquire of the forcible entry and detainer; if a forcible entry, &c. be found, contrary to this act, the justices shall cause the party so put out to be re-seized, or re-possessed. *Ibid.* sect. 4.

The justices, &c. making such inquiries, shall direct their warrants, &c. to the sheriff of the same county, to cause fit persons to come to inquire of such entries: a sheriff failing to do his duty forfeits eighty dollars, recoverable before any court of record; as well by indictment or information, to be taken only for the commonwealth, as by bill at the suit of the party grieved, as well for himself as the commonwealth. *Ibid.* sect. 5.

It is said that justices may proceed to inquire of forcible entries, &c. although no complaint be made to them. *Lamb.* 147.

And the defendant, if he is not present, ought to be called to answer for himself; for it is implied, by natural justice, in the construction of all laws, that no one ought to suffer any prejudice thereby, without having first an opportunity of defending himself. 1 *Haw.* 154.

And it seems to be settled, at this day, that if the defendant tender a traverse of the force, the justice ought not to make any restitution till the traverse be tried. *Ibid.*

It seems to be agreed that no other justices of the peace, except those before whom the indictment shall be found, shall have any power to make any award of restitution. 1 *Haw.* 152.

And the justice may break open the house by force to reseize the same; and so may the sheriff do, having the justice's warrant. *Dalt.* ch. 44.

That is, shall remove by force, by putting out all such offenders as shall be found in the house, or upon the lands, that entered or held with force. *Dalt.* ch. 130.

And this he may do in his own proper person, or he may make his warrant to the sheriff to do it. *Dalt.* ch. 44. 1 *Hawk.* 151. 2.

But "no restitution upon any indictment of forcible entry, or holding with force, shall be made to any, if the party indicted hath had the occupation, or hath been in quiet possession, by the space of three whole years together, next before the day of such indictment so found, and his estate therein be not ended or determined; which the party indicted may alledge for stay of restitution, and restitution shall stay till that be tried, if the other will deny or traverse the same; and if the same allegation be tried against the party so indicted, then the same party so indicted shall pay such costs and damages to the other party, as shall be assessed by the judges or justices, before whom the same shall be tried." 1 *Rev. Code*, p. 152, sect. 7.

And it hath been holden, that the plea of such possession is good, without shewing under what title, or of what estate such possession was; because it is not the title, but possession only, which is material, in this case. 1 *Hawk.* 152.

It was holden in Leighton's case, that the party may also traverse the entry and force. See 1 *Hawk.* 142.

And this traverse must be tendered in writing, and not by a bare denial of the fact in words; for thereupon a *venire facias* must be awarded, a jury returned, the issue tried, a verdict found, and judgment given, and costs and damages awarded; and there must be a record, which must be in writing, to do all this, and not a verbal plea. *Dalt.* ch. 133. 1 *Hawk.* 154.

Upon which traverse tendered, the justice shall cause a new jury to be returned by the sheriff, to try the traverse; which may be done the next day, but not the same day. *Dalt.* ch. 133.

## V. HOW PUNISHABLE ON A CERTIORARI.

Although, regularly, the justices only who were present at the inquiry, and when the indictment was found, ought to award restitution, yet, if the record of the presentment or indictment shall be certified by the justice or justices into a superior court, or the same presentment or indictment be removed and certified thither by *certiorari*, the justices of that court may award a writ of restitution, to the sheriff, to restore possession to the party expelled; for the justices of the said court have a supreme authority in all cases of the commonwealth. *Dalt.* ch. 44.

Also where, upon a removal of the proceedings into the superior court, the conviction shall be quashed, the court will order restitution to the party injured. As in the case of *K. v. Jones*. A conviction of forcible entry was quashed for the old exception of *messuage or tenement*, by reason of the uncertainty; but the restitution was opposed, on an affidavit that the party's title (which was by lease) was expired since the conviction. But the court said, they had no discretionary power in this case, but were bound to award restitution on quashing the conviction. *Str.* 474.

On a motion for a *certiorari* in this case, no notice to the adverse party is necessary. 1 *Rev. Code*, p. 81, sect. 45. 2 *Rev. Code*, p. 155, sect. 12.

VI. HOW PUNISHABLE AS A RIOT.

If a forcible entry, or detainer, shall be made by three persons, or more, it is also a riot, and may be proceeded against as such, if no inquiry hath been before made of the forces. *Dalt. ch. 44.*

VII. PRECEDENTS.

(A) *Precept to the sheriff to summon a jury.*

to wit:

Whereas A J, of                      in the county aforesaid, hath this day complained upon oath before me, J P, a justice of the peace for the said county, that on the                      day of                      last past, A O, of                      labourer, forcibly entered into one tenement, containing                      acres of land, lying, &c. (*here describe the land particularly*) then and there being in the possession of the said A J, and the said A J did unlawfully and forcibly expel from the same, and him so expelled, as aforesaid, did keep out and detain from the possession of the said lands and tenements. These are therefore on behalf of the commonwealth to require you, to cause to come before me twenty-four\* good and lawful men of this county, of                      in the parish of                      in the county aforesaid, on the                      day of                      next (twelve of whom to be sworn) to inquire, upon their oaths, of such things as shall then and there be enjoined them, on behalf of the commonwealth, touching the forcible entry and detainer aforesaid. And this you shall in no wise omit, under the penalty of eighty dollars, and have then there this warrant. Given under my hand and seal, &c.

*Juror's Oath.*

You shall true inquiry and presentment make of such things as shall come before you concerning a forcible entry (*or detainer*) said to have been lately committed in                      belonging to                      in this county, and a true verdict give, according to your evidence. So help you God.

(B) *The Inquest.*

to wit:

An inquisition for the commonwealth, indented and taken at                      in the parish of                      and county aforesaid, the                      day of                      in the                      year of the commonwealth, before E P, &c. a justice of the peace for the said county, and by the oath of F G, H J, &c. good and lawful men of the said parish and county; who, being charged and sworn, upon their oaths, do say, that A J, of &c. was lawfully and peaceably seized in his demesne as of fee (*if not seized*

\* "Though only twelve are sworn, yet twenty-four are to be returned, to supply the defects or want of appearance of those that are challenged off, or make default." (2 *Hale's Hist. Com. Law*, 137.) And so are all the precedents. See, as to the number of jurors, *Co. Lit.* 155. a. *Ibid. Hargr. note* (3.) *Bar- rington on Anc. Stat.* 18. *Tr. per pais* 92, 93. 3 *Bl. Com.* 375. *Christian's note*.

*to see, then say possessed*) of and in one messuage, with the appurtenances, situate in the parish of \_\_\_\_\_ and county aforesaid, and his said seizen *(or possession)* so continued, until A B, C D, &c. and other malefactors, to the jurors aforesaid unknown, on the \_\_\_\_\_ day of \_\_\_\_\_ last past, with strong hand and armed power, into the messuage aforesaid, with the appurtenances, did enter, and him the said A J thereof disseized, and with strong hand expelled, and him the said A J, so disseized and expelled from the said messuage, with the appurtenances aforesaid, from the said \_\_\_\_\_ day of \_\_\_\_\_ until the day of taking this inquisition, with like strong hand and armed power, did keep out, and do yet keep out, to the great disturbance of the commonwealth, and against the form of the statute in such case made and provided. In witness whereof, the said jurors to this inquisition have severally put their seals, the day, year, and place, first above mentioned

*(C) Warrant to the sheriff for restitution.*

county, to wit :

E P, one of the justices of the peace for the said county, to the sheriff thereof, greeting:

Whereas, by an inquisition taken before me, at \_\_\_\_\_ in the parish of \_\_\_\_\_ and county aforesaid, the \_\_\_\_\_ day of \_\_\_\_\_ in the \_\_\_\_\_ year of the commonwealth, upon the oaths of J B, B H, &c. and by virtue of the statute made and provided in cases of forcible entry and detainer, it is found that A B, C D, &c. on the \_\_\_\_\_ day of \_\_\_\_\_ now last past, into a certain messuage, with the appurtenances, of A J, of the parish and county aforesaid, situate, lying, and being in the said parish and county, with force and arms did enter, and him the said A J thereof did disseize, and with strong hand drive out, and him the said A J, thus driven out from the aforesaid messuage, with the appurtenances, from the \_\_\_\_\_ day of \_\_\_\_\_ aforesaid, to the day of the taking of the said inquisition, with strong hand, and armed force, did keep out, and do yet keep out, as by the inquisition aforesaid more fully appeareth of record. Therefore, on behalf of the commonwealth, I charge and command you, that, taking with you the power of the county *(if needful)* you go to the said messuage, and other the premises, and the same, with the appurtenances, you cause to be reseized; and that you cause the said A J to be restored and put into his full possession thereof, according as he before the entry aforesaid was seized, according to the form of the said statute; and this you shall in no wise omit. Given under my hand and seal, at the county aforesaid, the \_\_\_\_\_ day of \_\_\_\_\_ in the \_\_\_\_\_ year of the commonwealth.

*(D) Record of a forcible detainer upon view.*

Be it remembered, that on the \_\_\_\_\_ day of \_\_\_\_\_ in the \_\_\_\_\_ year of the commonwealth, M B complained to us, E P and W T, two of the justices of the commonwealth, assigned to keep the peace in the said county, that D T, of &c. \_\_\_\_\_ G, of &c. into the *(here describe the place, lands, or tenement)* of him the said M B, situate within

the parish of                      and county aforesaid, did enter, and him the said M B. of the                      aforesaid, whereof the said M B, at the time of the entry aforesaid was seized in fee, unlawfully disseized and ejected, and the said                      from him to said M B, unlawfully, with strong hand and armed power, do yet hold, and from him detain, against the form of the statute in such case made and provided; whereupon the same M B, then, to wit, on the said                      day of                      prayeth of us, so as aforesaid being justices, to him in this behalf, that a due remedy be provided, according to the form of the statute aforesaid. Which complaint and prayer by us therefore, the said justices, being heard, we, the aforesaid E P and W T, justices aforesaid, to the                      aforesaid, personally have come, and do then and there find and see the aforesaid D T, W G, &c. the aforesaid                      with force and arms, unlawfully, with strong hand and armed power, detaining, against the form of the statute in such case made and provided, according as he the said M B so as aforesaid complained. Therefore, it is considered by us, the aforesaid justices, that the aforesaid D T, W G, &c. of the detaining aforesaid, with strong hand, by our own proper view, then and there as aforesaid, are convicted, and each (or every of them) is convicted, according to the form of the statute. In witness whereof we, the said E P and W T, the justices aforesaid, to this record our hands and seals do set, at the county aforesaid, on the                      day of                      in the                      year of the commonwealth.

*(E) Indictment for a forcible entry and detainer, at common law.*

The jurors, &c. upon their oath, present, that J G, of &c. T F, of &c. together with divers others, disturbers of the peace of the commonwealth (whose names to the jurors aforesaid are yet unknown) on the                      day of                      in the                      year of the commonwealth, with force and arms, at                      aforesaid, in the county aforesaid, unlawfully and injuriously did enter into (here describe the lands or tenements) then and there being in the possession of one A J, and that the said J G and T F, together with the said other disturbers of the peace, then and there, with force and arms, unlawfully and injuriously did expel, remove, and put out the said A J, from the possession of the said                      and the said A J, so as aforesaid expelled, removed, and put out from the possession of the said                      then and there, with force and arms, unlawfully and injuriously did keep out, to the great damage of him the said A J, and against the peace and dignity of the commonwealth.

*(F) On the statute.*

county, to wit:

The jurors, &c. upon their oath, present, that A J, late of the parish of                      in the county aforesaid, on the                      day of                      in the                      year of the commonwealth, was possessed of a certain messuage; with the appurtenances, situate, lying, and being in the



parish and county aforesaid, for a certain term of years, then and still to come and unexpired, and being so possessed thereof, one A O, of the said county, afterwards, to wit, the said day of in the year aforesaid, into the same messuage, with the appurtenances aforesaid, in the parish and county aforesaid, with force and arms, and with strong hand, unlawfully did enter, and the said A J, from the peaceable possession of the said messuage, with the appurtenances aforesaid, then and there, with force and arms, and with strong hand, unlawfully did expel and put out, and the said A J, from the possession thereof, so as aforesaid, with force and arms, and with strong hand, being unlawfully expelled and put out, the said A O, him the said A J, from the aforesaid day of in the year aforesaid, until the day of the taking this inquisition, from the possession of the said messuage, with the appurtenances aforesaid, with force and arms, and with strong hand, unlawfully and injuriously then and there did keep out, and still doth keep out, to the great damage of the said A J, against the peace and dignity of the commonwealth, and against the form of the statute in that case made and provided.

N. B. If the person expelled has a freehold, then he must, instead of being *possessed*, be said to be seized *in fee*; and of course, instead of being *expelled*, *removed*, &c. as, when held by lease, he must be said to be *disseized*.

## FORESTALLING.

AT the common law, all endeavours whatsoever to enhance the common price of any merchandise, and all kinds of practices which have an apparent tendency thereto, whether by spreading false rumours, or by buying things in a market before the accustomed hour, or by buying and selling again the same thing in the same market, or by any other such like devices, are highly criminal, and punishable by fine and imprisonment. *Haw. B. l. c. 80, sect. 1, 5.*

☞ The statutory provisions, on this subject, in Virginia, having from long disuse become more a matter of curiosity than real utility, a history only will be attempted.

At the first settlement of Virginia, when the supplies of the inhabitants were drawn from England, it was of serious importance to prevent the ingrossing of commodities, and forestalling the market. Accordingly, in the session of 1629, an act passed to prevent ingrossing and forestalling (see 1 vol. *Stat. at Large*, 150.) which was further enforced by an act of 1631. (*Ibid.* p. 166.) At the same session, all the statutes of England against forestallers and engrossers were adopted. (*Ibid.* p. 172.) In 1632, further restrictions were imposed (*Ibid.* p. 190.) and forestalling defined, by an act, which was nearly copied from the stat. 5 and 6 *Edw. 6. c. 14.* (*Ibid.* p. 194. and see *Leach's Haw.* 7th edit. vol. ii. p. 322.) In 1633, the purchasing of cer-

tain enumerated articles, to sell again, was prohibited (see 1 vol. *Stat. at Large*, p. 217.) which law was re-enacted in the revisal of 1648. (*Ibid.* p. 245.) But in 1645, all acts against ingrossing were repealed. *Ibid.* p. 296.

From the year 1645 to 1777, no mention is made in our statute-book of any laws to prevent forestalling. Probably the same reason which led to enacting them, at the first settlement of the colony, gave rise to their re-enaction at this time, when the pressure of the war, the infancy of our domestic manufactures, added to the uncertain supplies of some of the necessities of life (particularly *salt*) rendered such laws as important as at any former period of our existence. Thus, in 1777, an act passed "*to prevent forestalling, regrating, ingrossing, and public vendues,*" which, like the act of 1632, was, in its most essential parts, taken from the stat. 5 and 6 *Edw.* 6. above mentioned. (See *Laws of Virg.* edit. 1785, p. 65.) This act, though in force, had become so obsolete, that it was not even noticed in the revised bills of 1792. At the session of 1792, however, so much of it, as prevented the sale of goods, wares, and merchandises, at public vendue, was repealed; but that repealing act was omitted in the first volume of the *Revised Code*. See Acts of 1792, ch. 22, p. 83. and *Rev. Code*, vol. ii. *App. No. IX.* p. 177.

## FORFEITURE.

AMONG the many important changes made in our laws, since the American revolution, the abolition of the odious and inhuman law of forfeiture is not the least to be admired. While humanity shuddered at the idea of reducing to distress and poverty an innocent and helpless wife and children, for the crimes of the husband or father, experience taught that the example of such cruel and unjust severity did not deter others from the commission of similar acts. From this conviction the legislature of Virginia, in the year 1789, first abolished all the forfeitures which formerly accrued to the commonwealth, on the conviction or attainder of a person for treason or felony. See 1 *Rev. Code*, p. 106, sect. 31, 32.

There are, however, some forfeitures in cases not criminal, which act immediately on the person of the offender, that deserve to be noticed here:

As, "If a wife willingly leave her husband, and go away and continue with her adulterer, she shall be barred for ever of action to demand her dower, that she ought to have of her husband's lands, if she be convict thereupon, except that her husband willingly, and without coercion, reconcile her, and suffer her to dwell with him; in which case she shall be restored to her action." 1 *Rev. Code*, p. 171. sect. 10.



So, " If any tenant by the curtesy, tenant in dower, or otherwise, for term of life or years, shall commit waste during their several estates or terms, of the houses, woods, or any other thing belonging to the tenements so held, without special licence in writing so to do, they shall be subject respectively to an action of waste, and shall moreover lose the thing wasted, and recompence the party injured, in three times the amount at which the waste shall be assessed. 1 *Rev. Code*, 277.

With respect to the forfeiture of slaves held in dower, see title **SLAVES**.

## FORGERY.

**FORGERY** is an offence both at common law and by statute.

Forgery at the common law is an offence, in falsely and fraudulently making or altering any manner of record, or any other authentic matter of a public nature; as a parish register, or any deed, will, privy seal, certificate of holy orders, and the like. 1 *Hawk*. 182, 184.

As for writings of an inferior nature, as private letters and such like, the counterfeiting them is not properly forgery, therefore, in some cases, it may be more safe to prosecute such offenders as for a misdemeanor as cheats. For by reason of the uncertainty of opinions, concerning proper forgeries at common law, indictments are more generally upon the statutes, and very few on the common law. See **CHEAT**.

But if the indictment be at the common law, and the offender is convicted, he may be pillored, fined and imprisoned. *Wood*, B. 3. ch. 3. 1 *Hawk*. 184.

" If any person shall falsely make, forge, or counterfeit, or cause or procure to be falsely made, forged, or counterfeited, or willingly act or assist in the false making, forging or counterfeiting any deed, will, testament, bond, writing obligatory, bill of exchange, promissory note for the payment of money or tobacco, or other valuable thing, or any acquittance or receipt, either for money or tobacco, or other valuable thing, or any indorsement or assignment of any bond, writing obligatory, bill of exchange, promissory note, for the payment of money or tobacco, or other valuable thing, with intention to defraud any person or persons whatsoever, or any corporation, or shall utter or publish as true any false, forged, or counterfeited deed, will, testament, bond, writing obligatory, bill of exchange, promissory note, for the payment of money or tobacco, or other valuable thing, acquittance or receipt for money, tobacco, or other valuable thing, with intention to defraud any person or persons whatsoever, or any corporation, knowing the same to be false, forged or counterfeited, then every such person, being thereof legally convicted, shall be deemed

guilty of felony, and shall suffer death as a felon, without benefit of clergy. (1 Rev. Code, p. 330.) But these offences of forgery not being enumerated in the penitentiary laws, are punishable by confinement therein, not less than one or more years. See 1 Rev. Code, p. 330.

If any person shall forge or counterfeit, alter or erase, any certificate or warrant, issued by any person properly authorised either by Congress or the Legislature of this State, for the payment of money, or shall be aiding or assisting therein, or shall demand payment thereof, knowing the same to be forged, counterfeited, altered or erased, or shall transfer any such certificate or warrant, knowing the same to be forged, or counterfeited, altered or erased; or shall forge or counterfeit, alter or erase any certificate whatever, for the purpose of obtaining a settlement of money from any person, properly authorised either by Congress or the Legislature of this State, or shall be aiding or assisting therein, or shall require settlement thereon, or transfer the same, knowing it to be forged, counterfeited, altered or erased, the person so offending, and legally convicted, shall suffer death without benefit of clergy. 1 Rev. Code, p. 249, sect. 3.

If any person shall forge or counterfeit, alter or erase the stamp or receipt of any inspector of flour or hemp, or tender in payment any such forged or counterfeited, altered or erased receipt, knowing it to be such, and shall thereof be convicted, he shall suffer death without benefit of clergy. *Ibid.* sect. 4.

He shall be adjudged a felon, and not have the benefit of clergy, who shall forge or counterfeit, alter or erase the stamp or receipt of any inspectors of tobacco, or shall cause it to be so done, or shall assist therein, or shall pass or tender, or cause to be passed or tendered, any such in payment or exchange, knowing the same to be forged, counterfeited, altered or erased, or shall have in his possession any inspector's stamp or receipt, which hath been altered or erased, knowing the same; and shall not discover such stamp or receipt to two justices, within five days after they shall have come to his possession, or shall export, or cause to be exported, any hogshead or cask of tobacco, stamped with a forged or counterfeited stamp, or shall receive or demand tobacco of an inspector upon any forged or counterfeited, altered or erased stamp or receipt, knowing such stamp or receipt to be forged or counterfeited, altered or erased. *Ibid.* sect. 5.

He shall be adjudged a felon, and not have the benefit of clergy, who shall steal, or by any other means take from the possession of another, any warrant from the register of the land office of this commonwealth, to authorise a survey of waste and unappropriated lands; or who shall alter, erase, or aid or assist in the alteration or erasure of any such warrant; or forge or counterfeit, or aid, abet, or assist, in forging or counterfeiting any written or printed paper, purporting to be such warrant; or who shall transfer to the use of another, or for his own use present, or cause to be presented to the register, for the exchange thereof, or to a surveyor, for the execution thereof, any such warrant, or paper purporting to be such warrant, knowing the same to be stolen, or altered, or erased, or forged or counterfeited. And he or she shall be adjudged a felon, and not have the benefit of clergy, who shall falsely make or counterfeit, or aid, abet, or assist in safely keeping, or

counterfeiting any instrument, stamping an impression in the figure and likeness of the seal officially used by the register of the land-office, or who shall have his or her possession or custody such instrument, and shall wilfully counterfeit the same, knowing it to be falsely made or counterfeited. 1 Rev. Code, p. 250.

☞ The above offences of forgery are punishable by imprisonment in the penitentiary, for a period of less than one, nor more than two years. See 1 Rev. Code, p. 402.

☞ Issuing a certificate of the emancipation of a slave subjected the offender to a fine of two hundred dollars, and one year's imprisonment without ban or mainprise. 1 Rev. Code, p. 347, sect. 5.

Free negroes or mulattoes granting their registers of freedom to a slave to enable him to pass as a freeman, subjects them to the penalties of felony. 1 Rev. Code, p. 374, sect. 5.

☞ For forgeries of bank notes, &c. see CHEATS, COUNTERFEITING.

### (A) Warrant for Forgery.

county, to wit.

Whereas A J, of                    hath made oath before me J P, a justice of the peace for the said county, that B O, of                    did feloniously forge and counterfeit a certain writing, purporting to be a (describe the instrument with convenient certainty; or 'did feloniously alter a certain                   ,' as the case may be.) These are, therefore, to command you to apprehend the said B O, and bring him before me, or some other justice of the peace of the said county of                    forthwith to answer the premises, and further to be dealt with according to law. Given under my hand and seal, &c.

To                    to execute.

☞ For the forms of a recognizance, commitment, &c. see title CRIMINALS, and those titles respectively.

1. Making a second deed and antedating it, in order to make it take place of a former deed, is forgery. 3 Inst. 169.

2. If any person who writeth the will of a sick man inserteth a clause therein, concerning the devise of lands, without any direction of the deviser, this is forgery, although he did not forge the whole will. 3 Inst. 170.

3. With respect to incurring a penalty for publishing or passing counterfeits, knowing them to be counterfeits, this knowledge may be derived from two means, either of his own knowledge, or the information of others; for if another tell him that it is forged, and he publish it afterwards as true, and it proves to be forged indeed, he is in danger of the statute. 1 Hawk. 187.

But lord Hale says, that though such a relation may be an evidence to prove his knowledge, yet it is not conclusive; for perhaps there might be circumstances of fact that might make the person relating it, or his relation, not credible. So that the knowing must be upon the whole matter left to the jury, upon the circumstances of the case. 1 Hale 685.

(B) *Indictment for forging and altering a bond, with intention to defraud two different persons.*

county, to wit.

The jurors for, &c. upon their oath present, that late of the parish of in the county of esquire, on the day of in the year with force and arms, at the parish aforesaid, in the county aforesaid, feloniously did falsely make, forge, and counterfeit, and feloniously did cause and procure to be falsely made, forged and counterfeited, and feloniously did willingly act and assist in the false making, forging, and counterfeiting, a certain paper writing, partly printed and partly written, purporting to be a bond, and to be signed by one with the name of him the said and to be sealed and delivered by him the said the tenor of which said false, forged, and counterfeited paper writing, partly printed and partly written, purporting to be a bond, is as follows; that is to say, ' Know all men, &c. (*here set out the bond and condition as they may be*) with intention to defraud the said against the form of the statute in such case made and provided, and against the peace and dignity of the commonwealth. And the jurors aforesaid, upon their oath aforesaid, do further present, that the said afterwards, to wit, on the day of in the year aforesaid, with force and arms, at the parish aforesaid, in the county aforesaid, feloniously did utter and publish as true, a certain false, forged, and counterfeited paper writing, partly printed and partly written, purporting to be a bond, and to be signed by the said with the name of him the said and to be sealed and delivered by the said the tenor of which said last mentioned false, forged, and counterfeited paper writing, partly printed and partly written, purporting to be a bond, is as follows, that is to say, Know, &c. (*as before*) with intention to defraud the said (he the said at the time of the uttering and publishing of the said last mentioned false, forged, and counterfeited paper writing, partly printed and partly written, purporting to be a bond, then and there well knowing the said last mentioned false, forged, and counterfeited paper writing, partly printed and partly written, purporting to be a bond, to be false, forged, and counterfeited) against the form of the statute, in such case made and provided, and against the peace and dignity of the commonwealth. And the jurors aforesaid, upon their oath aforesaid, do further present, that the said afterwards, to wit, on the said day of in the year aforesaid, with force and arms, at the parish aforesaid, in the county aforesaid, feloniously did falsely make, forge and counterfeit, and feloniously did cause and procure to be falsely made, forged and counterfeited, and feloniously did willingly act and assist in the false making, forging and counterfeiting, a certain paper writing, partly printed and partly written, purporting to be a bond, and to be signed by the said with the name of him the said and to be sealed and delivered by the said the tenor of which said last mentioned false, forged, and counterfeited paper writing, partly printed and partly written, purporting to be a bond, is as follows, that is to say, ' Know, &c.'



(as before) with intention to defraud one doctor in physic, against the form of the statute in such case made and provided, and against the peace and dignity of the commonwealth. And the jurors aforesaid, upon their oath aforesaid, do further present, that the said afterwards, to wit, on the said day of in the year aforesaid, with force and arms, at the parish aforesaid, in the county aforesaid, feloniously did utter and publish, as true, a certain false, forged, and counterfeited paper writing, partly printed and partly written, purporting to be a bond, and to be signed by the said with the name of him the said and to be sealed and delivered by the said which said last mentioned false, forged, and counterfeited paper writing, partly printed and partly written, purporting to be a bond, is as follows, that is to say, ' Know, &c.' (as before) with intention to defraud the said (he the said at the time of the uttering and publishing of the said last mentioned false, forged, and counterfeited paper writing, partly printed and partly written, purporting to be a bond, then and there well knowing the said last mentioned false, forged, and counterfeited, paper writing, partly printed and partly written, purporting to be a bond, to be false, forged, and counterfeited) against the form of the statute in such case made and provided, and against the peace and dignity of the commonwealth.

For more precedents of indictments under this title, see *Cro. Cir. Com.* title 'FORGERY,' and *Cro. Cir. Assistant*, p. 422, &c.

## FORNICATION.

' EVERY person, not being a servant or slave, committing adultery, or fornication, and being thereof lawfully convicted by the oaths of two or more credible witnesses, or confession of the party, shall, for every offence of adultery, forfeit and pay twenty dollars, and for every offence of fornication, ten dollars; to be recovered by the suit or prosecution of the overseers of the poor of the county or corporation wherein such offence shall be committed, by bill, plaint, or information, in any court of record within this commonwealth, wherein no essoin, protection, or wager of law shall be allowed; which said fines and penalties shall accrue to the overseers of the poor, for the use of the poor of the county or corporation wherein the said offence shall be committed. 1 Rev. Code, p. 276. sect. 6.

FRAUD, see CHEATS.

## FRUIT TREES.

‘ALL owners of horses, mares, cattle, and other beasts, which they know to have barked fruit trees, shall keep the same within their own fence ground; and if any person shall take up any horse, mare, kine, or other beast, known by the owner to have barked fruit trees, and shall deliver the same to such owner, he or she shall pay the taker up two dollars for every such beast so taken up and delivered; recoverable, with costs, before any justice of the peace of the county wherein such beast was taken up, or the owner lives. Provided always, That the taker up shall, if required, make oath before the same justice, that he took up such horse, mare, or other beast, and that no means were used by himself, or any other person to his knowledge, to set the same at large, otherwise he shall lose the said reward.’ 1 Rev. Code, p. 274, sect. 4.

### *Warrant.*

county, to wit.

Complaint being this day made to me J P, a justice of the peace for the county aforesaid, by T B, that the said T B did, on the       day of       last, take up a horse (or cow, as the case is) at large, at in the said county, belonging to G P, which the said G P knew to have barked fruit trees, and delivered the same to the said G P, who refused to pay to the said T B two dollars for the same, according to the act of the General Assembly in that case made and provided. These are therefore, in the name of the commonwealth, to require you to bring the said G P before me, or some other justice of the peace for the said county, to answer the premises. Given, &c.

To       constable.

### *Judgment.*

On hearing the within complaint, it being proved before me, by the oath of       that the within named T B did take up the horse (or cow) therein mentioned, belonging to the said G P, and that no means were used by the said T B, or others, to his knowledge, as he hath declared upon oath before me, to set the same at large. It is therefore considered that the said T B recover, against the said G P, two dollars, together with his costs in this behalf expended. Given, &c.

Costs       cents.



## GAMING.

The laws on this subject may be found in 1 *Rev. Code*, ch. 96, p. 174, ch. 221, p. 373, and 2 *Rev. Code*, ch. 15, p. 11.

As but few of the penalties imposed by these laws are cognizable before a single magistrate, and the insertion of all the acts would occupy too much room, it has been deemed sufficient to give the necessary precedents for their use.

### *(A) Warrant for gaming, on 1 Rev. Code, ch. 96. sect. 5.*

county, to wit.

Whereas information hath this day been made before me A B, gentleman, one of the commonwealth's justices of the peace of the said county, by G H, of, &c. that C D hath been guilty of unlawful gaming, by playing at in an ordinary (race field, or public place) in the parish of in the county aforesaid. These are therefore, in the name of the commonwealth, to will and require you to summon the said C D to appear before me, or some other justice of the peace of this county, to show cause why the penalty of twenty dollars should not be levied upon him for his said offence, according to the act of Assembly in this case made. Given, &c.

To J C, constable.

### *Judgment.*

On hearing the within complaint, and it being proved that the within named C D is guilty (or confesses himself guilty) it is therefore considered that the sum of twenty dollars be levied upon him, for the use of the poor of the parish of Given, &c.

### *Warrant of Distress.*

county, to wit.

A B, one of the justices of the peace of the said county, to the constable of

Whereas C D hath been duly convicted before me (or by my own view, or hath confessed himself guilty) of unlawful gaming, in the parish of and county aforesaid. These are therefore, in the name of the commonwealth, to require you to levy by distress and sale, of the goods and chattels of the said C D, the sum of twenty dollars current money, for his offence aforesaid; and that you pay the the overseers of the poor thereof. Herein fail not, and make

due return of this warrant, and how you have executed the same, to me, or some other justice of this county, on or before the day of next. Given, &c.

*Mittimus.*

county, to wit.

To the jailor of the said county of

I send you herewith the body of C D, this day duly convicted before me (or upon my view) of having been guilty of unlawful gaming; and I hereby require you to receive the said C D into your jail and custody, and him safely to keep until he shall enter into a recognizance, with two sufficient securities, himself in        dollars, and each security in        dollars, with condition for his being of good behaviour for twelve months from this day, or until he shall be thence discharged by due course of law.

If an appeal to the county court is prayed by the defendant, the magistrate should take his bond, with security, in double the sum recovered, payable to the plaintiff, and with condition as followeth. See 1 Rev. Code, p. 176, sect 10.

The condition of this obligation is such, that whereas the above-named G H hath obtained judgment upon warrant before me A B, one of the commonwealth's justices of the peace for the county of        against the above bound C D, for twenty dollars, for the use of the poor of the district of        in the county of        from which judgment the said C D hath prayed an appeal to the next court to be held for the said county of        Now if the said C D shall try the said appeal at the next court, and perform the judgment of the court thereupon, then this obligation to be void, else to remain in full force and virtue.

*Form of a record to be made up and certified by the justice to the county court on such appeal.*

county, to wit.

Be it remembered, that on the        day of        last past, on information that C D had been guilty of unlawful gaming, I issued my warrant to summon the said C D to answer for his said offence. In the words following, to wit (*here insert the warrant verbatim*) which warrant being returned executed by E F, constable, the said C D appeared before me this day, and was fully heard on the subject matter of the said information, when it was fully proved that he was guilty of the offence in the warrant mentioned. Therefore it is considered that the fine of twenty dollars be levied upon him for his said offence, according to the act of the General Assembly aforesaid.

From which judgment the said C D prayed an appeal to the next court to be held for this county, which is allowed, he having entered into bond, with security, for trying the same according to law; which bond is hereunto annexed. Certified under my hand and seal this        day of        &c.



(B) *Warrant against a common gambler, on 1 Rev. Code, ch. 96. sect. 7.*

county, to wit.

Whereas we have just cause to suspect that H H, of, &c. is an idle person, having no visible estate, profession or calling, to maintain himself by, but doth for the most part support himself by gaming, contrary to the act of the General Assembly in that case made and provided. Therefore, we command you, that you forthwith cause the said H H to come before us, or some other justices of the peace of this county, to be examined concerning the premises. Herein fail not. Given under our hands and seals, &c.

**J. P.**

K. P.

***Condition of the recognizance.***

(The penalty may be in the common form; for which see title RECOGNIZANCE.)

The condition of this recognizance is such, that whereas the above bound H H was this day brought before J P and K P, two of the commonwealth's justices of the peace of the county of upon their warrant, for the suspicion of his being an idle person, having no visible estate, profession or calling, to maintain himself by, but for the most part supporting himself by gaming; and the said H H, upon examination before the justices aforesaid, not making it appear to them that a principal part of his expences was not maintained by gaming, and thereupon he was required to give sufficient securities for his good behaviour, pursuant to the act of the General Assembly in that case made and provided. If therefore the said H H shall be of good behaviour towards the commonwealth, and all the citizens within the same, for and during the space of twelve months next ensuing the date of these presents, then this recognizance to be void, else to remain in full force.

*Mittimus.*

To the sheriff or keeper of the jail of \_\_\_\_\_ county.  
county, to wit.

We send you herewith the body of H H, late of, &c. taken upon our warrant, and brought before us on suspicion of his being an idle person, of no visible estate, profession or calling, to maintain himself by, but for the most part supporting himself by gaming; and the said H H, on examination before us, failing to make it appear that the principal part of his expences is not maintained by gambling, and having refused to give security for his good behaviour for twelve months next ensuing, according to the act of the General Assembly in such case made and provided. We therefore charge you to receive the said H H into your jail and custody, and him there safely to keep, till he shall enter into a recognizance, with two sufficient securi-

ties, himself in        dollars, and each security in        dollars, for his good behaviour as aforesaid, or until he shall be thence discharged by due course of law. Given, &c.

(C) *Warrant to seize and burn a gaming table, on 1 Rev. Code, ch. 96, sect. 11.*

*Corporation of        to wit.*

Whereas it appears to me J P, a magistrate for the corporation aforesaid, from my own view, that A O, of        doth keep and exhibit a gaming table, commonly called an A B C table (*or if any other kind, describe it*) at the house of        within the corporation aforesaid, contrary to the act of the General Assembly, in such case made and provided. These are therefore, in the name of the commonwealth, to require you forthwith to seize the said table, and publicly to burn or destroy the same; and for so doing this shall be your warrant. Given, &c.

To A C, constable.

☞ The above form may be varied so as to apply to a billiard table, which is equally liable to be seized and burnt. See 1 Rev. Code, ch. 221, sect. 2. p. 373.

(C) *Warrant to seize money, exhibited for gaming, on 1 Rev. Code, ch. 221, sect. 1.*

*to wit.*

Whereas information hath been given to me, that at the house of        in        a certain A O doth exhibit money, for the purpose of alluring persons to bet against, at a game called (*describe the game*) and that divers persons, to me unknown, do actually stake and bet their monies at the said game. These are therefore to authorise and require you to seize as well the said money exhibited, as that staked against it, wheresover the same may be found; and the same so seized you are to account for and pay to the court of this county, at the next court to be held for the same; and make return to me how you have executed this warrant. Given, &c.

To A B, C D, &c.

GOOD BEHAVIOUR, See SURETY.

GRAND LARCENY, See LARCENY.

GUARD, See CRIMINALS.

## HABEAS CORPUS.

AN *habeas corpus* (from the initial words of the writ, while all legal proceedings were in Latin) is a writ for bringing the body of him who is imprisoned before the court, *with the cause of the detention.* 4 Com. Dig. 328.

This is called, by judge *Blackstone*, the most celebrated writ in the English law, and is of various sorts, as,

1. *Habeas corpus ad respondendum* (to answer) when a man hath cause of action against one who is confined by the process of some inferior court, in order to remove the prisoner, and charge him with this new action in the court above. 3 *Bl. Com.* 129.

So, it lies where a man is entitled to privilege in an inferior court where he is sued; and if, upon the return, it appears that he was committed without cause, or by a court having no jurisdiction, he shall have his privilege. 2 *H. H.* 144.

If a defendant be in prison at the suit of another, the special bail may have him brought up by *habeas corpus*, in order to surrender. 1 *Sellon's Pr. K. B.* 175.

2. *Habeas corpus, ad satisfaciendum*, when a prisoner hath had judgment against him in an action, and the plaintiff is desirous to bring him up to some superior court to charge him with execution. 3 *Bl. Com.* 130.

3. *Habeas corpus, ad prosequendum, testificandum, deliberandum, &c.* which issue when it is necessary to remove a prisoner, in order to bear testimony, or prosecute in any court.

4. *Habeas corpus, ad faciendum, et recipiendum* (to do and receive) which issues from a superior court, when a person is sued in some inferior jurisdiction, and is desirous to remove the action into the superior court. This writ directs the body of the prisoner to be produced, together with the day and cause of his caption and detainer (whence it is frequently denominated an *habeas corpus cum causa*.) It is grantable of common right, without any motion in court, and instantly supersedes all proceedings in the court below. 3 *Bl. Com.* 130.

5. The great and efficacious writ, in all manner of illegal confinement, is that of *habeas corpus ad subjiciendum*; directed to the person detaining another, and commanding him to produce the body of the prisoner, with the day and cause of his caption and detention, *ad faciendum, subjiciendum, et recipiendum*, to do, submit to, and receive whatsoever the judge or court awarding such writ shall consider in that behalf. 3 *Bl. Com.* 131.

As to the mode of proceeding, on writs of *habeas corpus*, by the laws of Virginia, see 1 *Rev. Code*, p. 231. *Ibid* p. 77, sect. 22. *Ibid* p. 92, sect. 67. 2 *Rev. Code*, ch. 108, sect. 2, p. 135.

It will yet be necessary to insert some points of information which apply only to writs of *habeas corpus*, and those respect the return, and proceedings thereon, as to discharging or remanding the prisoner.

The officer must shew by his return, by whom the party was committed, and the cause of the commitment. 2 *Inst.* 55.

And the return must answer to the taking as well as to the detention. 2 *Bl. Rep.* 1204.

And if he does not make a return after the delivery of the writ, an attachment lies against him. (2 *Jones* 173.) Even though his charges are refused. *Ibid*.

The return to *habeas corpus* ought to shew the cause of commitment, specially and certainly. 2 *Inst.* 55. *Cro. Car.* 507. *Vau.* 137. *Pal.* 538.

See various instances. 4 *Com. Dig.* 332, 334.

At the return of an *habeas corpus*, the court, generally, ought to discharge, or remand the party. 2 *Inst.* 55. 2 *H. H.* 143.

And therefore, if the return shew no cause, or no sufficient cause, for the imprisonment and detainer, he shall be discharged. 2 *Inst.* 55, 615. *Vau.* 156.

But if the return shews a sufficient cause, he shall be remanded. 2 *Inst.* 55.

Yet the superior court may bail if they please, though the return be sufficient. 2 *Inst.* 55. *Vau.* 157. 1 *Sed.* 78.

See 4 *Com. Dig.* 335.

Upon an *habeas corpus* to remove a cause out of an inferior court, a *procedendo* shall be awarded, if it appears that the action is maintainable there only. *Carth.* 75.

After interlocutory judgment, it is too late to remove a cause, and *procedendo* shall be awarded. *Barnes* 221.

So, after issue joined. *Ibid.*

An *habeas corpus*, for surrendering a man in discharge of his bail, may be made returnable *immediatety*. 4 *Com. Dig.* 340.

But generally an *habeas corpus* shall be returnable at a day certain. *Ibid.*

HIGH TREASON. See TREASON.

HIGHWAYS. See ROADS.

HIGHWAY-MEN. See ROBBERY.

## HOGSTEALING.

FORMERLY the punishment of a person, not being a slave, for hogstealing was, for the first offence, twenty-five lashes, at the public whipping-post, or the payment of thirty dollars, towards lessening the county levy, besides eight dollars for every hog to the owner; for the second offence, to stand in the pillory for two hours on a court day, with his ears nailed thereto, and after the expiration of that time, to have them cut off, and moreover pay the owner eight dollars for each hog; and for the third offence, to be adjudged a felon. (See 1 *Rev. Code*, ch. 98, sect. 1, 2, 5.) But now, "if any person shall steal any hog, shoat, or pig, such person shall be adjudged to be guilty of petty larceny, and shall have the same trial and punishment, as in other cases of petty larceny." 2 *Rev. Code*, p. 80, sect. 4.

For the proceedings against slaves, see 1 *Rev. Code*, ch. 98, sect. 4, p. 177.


### *Warrant against a slave, for hogstealing.*

county, to wit:

To the constable of \_\_\_\_\_ in the said county.

Whereas complaint is made to me, that \_\_\_\_\_ a negro man slave, belonging to A B, of this county, hath lately stolen \_\_\_\_\_ hogs, the

property of C D. You are therefore required to bring the said together with such witnesses as the said C D shall direct, before me, or some other justice of this county, to be examined concerning the premises. Given, &c.

 The owner of the slave, or some other free person, may give security for his appearance at the next court; the form of which recognizance may be seen under titles CRIMINALS and RECOGNIZANCE.

### *Mittimus.*

county, to wit:

To the sheriff, or keeper of the jail of the said county.

I send you herewith the body of a negro man slave, belonging to A B, of this county, who, upon his examination before me, appears to be guilty of hogstealing; and I do hereby require you to receive the said into your jail and custody, and him safely to keep, till sufficient security be given for his appearance at the next court to be held for this county, then and there to answer an information to be exhibited against him for his offence aforesaid, and to abide the judgment of the said court, or until he be otherwise discharged by due course of law. Given, &c.

## HOMICIDE.

HOMICIDE, in law, signifies the killing of a man by a man. 1 Haw. 66.

And it includes in it, not only petit treason, concerning which see title TREASON; but also the several offences which are treated of in the following sections.

There is also another kind of untimely death of a man, not properly homicide: when he is killed by a horse, a cart, a tree, or the like, and not by a man; which is called casual death; for which see title DEODAND.

- I. Justifiable homicide. II. Homicide by misadventure. III. Homicide by self defence. IV. Manslaughter. V. Murder. VI. Self murder. VII. Duelling.*

### I. JUSTIFIABLE HOMICIDE.

To make homicide justifiable, it must be owing to some unavoidable necessity, to which the person who kills another must be reduced, without any manner of fault in himself. 1 Haw. 69.

And there must be no malice coloured under pretence of necessity; for wherever a person who kills another acts in truth upon malice,

and takes occasion from the appearance of necessity to execute his own private revenge, he is guilty of murder. *Ibid.*

It is said in the old books, that one may set forth a fact, amounting to justifiable homicide, on an indictment of murder; and that the same being found true, he shall be dismissed, without being arraigned, or enforced to plead *not guilty*. And indeed it seems extremely hard (says Mr. *Hawkins*) that a sheriff or judge, who condemn or execute a criminal, &c. should be forced on a frivolous prosecution to hold up their hands at the bar for it, &c. 1 *Hawk.* (6th edit.) 103.

If rioters, or forcible enterers or detainers, stand in opposition to the justice's lawful warrant, and any of them is slain; it is no felony. *Hale's Pl.* 37.

If a man comes to burn my house, and I shoot out of my house, or issue out of my house and kill him; it is no felony. *Ibid.* 39.

If a woman kill him that assaulteth to ravish her; it is no felony. *Ibid.*

If a person, having actually committed a felony, will not suffer himself to be arrested, but stand on his own defence, or fly, so that he cannot possibly be apprehended alive by those who pursue him, whether private persons or public officers, with or without a warrant from a magistrate; he may be lawfully slain by them. 1 *Haw.* 70.

So, if a felony hath actually been committed, and an officer or minister of justice, having lawful warrant so to do, arrest an innocent person, and such person assault the officer or minister of justice; the officer is not bound by law to give back, but to carry him away; and if in execution of his office, he cannot otherwise avoid it, but in striving kill him, it is no felony. And in that case, the officer or minister of justice shall forfeit nothing; but the party so assaulting, or offering to fly away, and is killed, shall forfeit his goods. 3 *Inst.* 56.

Also, if a person arrested for felony break away from his conductors to jail, they may kill him, if they cannot otherwise take him. But in this case, likewise, there must have been a felony actually committed. *Hale's Pl.* 36, 37.

Also, if a criminal endeavouring to break the jail assault his jailor, he may be lawfully killed by him in the affray. 1 *Haw.* 71.

In civil causes; although the sheriff cannot kill a man who flies from the execution of a civil process, yet, if he resist the arrest, the sheriff or his officer need not give back, but may kill the assailant. *Hale's Pl.* 37.

So, if in the arrest and striving together the officer kill him, it is no felony. *Ibid.*

In all these cases, the party upon arraignment having pleaded not guilty, the special matter must be found; whereupon the party shall be dismissed, without any forfeiture, or pardon purchased. *Ibid.* 38.

Or, on *not guilty*, he may give the special matter in evidence; or, the jury may find a fact specially amounting to justifiable homicide. 1 *Hawk.* (6th edit.) 105.

## II. HOMICIDE BY MISADVENTURE.

I have purposely avoided the word *chance-medley* in this place, because authors do not seem to be agreed whether it is to be applied to

homicide *by misadventure*, or to *manslaughter*. Lord Coke and Mr. Hawkins seem to understand it of *manslaughter*; lord Pale and others, of homicide *by misadventure*. The original meaning of the word seems to favour the former opinion, as it signifies a sudden or casual meddling or contention; whereas, homicide *by misadventure* supposes no previous meddling or falling out. But the same author sometimes, in different places, applies it to both of them promiscuously. 2 *Burn's Just.* 414.

Homicide *by misadventure* is, where a man is doing a lawful act, without intent of hurt to another, and death casually ensues. *Hale's Pl.* 31.

As, where a labourer being at work with a hatchet, the head flies off and kills one who stands by. 1 *Haw.* 73.

Or, where a third person whips a horse, on which a man is riding, whereupon he springs out and runs over a child, and kills him; in which case the rider is guilty of homicide *by misadventure*, and he who gave the blow of *manslaughter*. 1 *Haw.* 73.

But, if a person riding in the street, whip his horse to put him into speed, and run over a child and kill him, it is homicide, and not *by misadventure*; and if he ride so, in a press of people, with intent to do hurt, and the horse killeth another, it is murder in the rider. 1 *H. H.* 476.

If a person drives his cart carelessly, and it runs over a child in the street, if he have seen the child, and yet drives on upon him, it is murder; but if he saw not the child, yet it is *manslaughter*; but if the child had run across the way, and the cart run over the child before it was possible for the carter to make a stop, it is *by misadventure*. *Ibid.*

So, where workmen throw stones, rubbish, or other things, from an house, in the ordinary course of their business, by which a person underneath happens to be killed; if they look out and give timely warning to those below, it will be homicide *by misadventure*; if without such caution, it will amount to *manslaughter* at least. It was a lawful act, but done in an improper manner. It is said by some, that if this be done in the streets of populous towns, it will be *manslaughter*, notwithstanding the caution above mentioned. But this will admit of some limitation. If it be done early in the morning, when few or no people are stirring, and the ordinary caution is used, it seemeth that the party is excusable. But when the streets are full, that will not suffice; for, in the hurry and noise of a crowded street, few people hear the warning, or sufficiently attend to it. *Fost.* 262, 263.

It is said before, that this homicide is only when it happeneth upon a man's doing a lawful act; for if the act be unlawful, it is murder. As, if a person meaning to steal a deer, in another man's park, shooteth at the deer, and by the glance of the arrow killeth a boy, that is hidden in a bush, this is murder, for that the act was unlawful, although he had no intent to hurt the boy, nor knew of him. But if the owner of the park had shot at his own deer, and without any ill intent had killed the boy by the glance of his arrow, this had been homicide *by misadventure*, and no felony. 3 *Inst.* 56.

So, if any one shoot at any wild fowl upon a tree, and the arrow kill any reasonable creature afar off, without any evil intent in him,



this is by misadventure ; for it was not unlawful to shoot at the wild fowl. But if he had shot at a cock or a hen, or at any tame fowl of another man's, and the arrow by mischance had killed a man ; if his intention was to steal the poultry (which must be collected from circumstances) it will be murder, by reason of the felonious intent ; but if it was done wantonly, and without that intention, it will be barely manslaughter. *Fost.* 258, 9.

The rule laid down supposeth that the act, from which death ensued, was *malum in se*. For if it was barely *malum prohibitum*, as shooting at game by a person not qualified by statute law to keep or use a gun for that purpose ; the case of a person so offending will fall under the same rule as that of a qualified man. For the statutes prohibiting the destruction of the game, under certain penalties, will not in a question of this kind enhance the accident beyond its intrinsic moment. *Fost.* 259.

Further, if there be an evil intent, though that intent extendeth not to death, it is murder. Thus, if a man knowing that many people are in the street throw a stone over the wall, intending only to fright them, or to give them a little hurt, and thereupon one is killed, this is murder ; for he had an ill intent, though that intent extended not to death, and though he knew not the party slain. 3 *Inst.* 57.

And it is a general rule, in case of all felonies, that wherever a man, intending to commit one felony, happens to commit another, he is as much guilty, as if he had intended the felony which he actually commits. 1 *Haw.* 74.

But in all the cases above, if it doth only hurt a man by such an accident, it is nevertheless a trespass ; and the person hurt shall recover his damages ; for though the chance excuse from felony, yet it excuseth not from trespass. 1 *H. H.* 472.

This homicide is not felony, because it is not accompanied with a felonious intent, which is necessary in every felony. 1 *Haw.* 73.

There can be no doubt but that a person apprehended for the commission of this act is bailable. See 'BAIL.'

The forfeiture which ensued on homicide by misadventure is now abolished. See 'ATTAINDER.'

The act of 22 *Geo.* II. ch. 31, sect. 23, which exempted from punishment any person for causing the death of a slave during his correction is repealed by the act of 1788. ch. 23.

'In case it be found by the country, that any man by misfortune, or in his own defence, or in other manner without felony, did kill another, he shall be acquitted.' 1 *Rev. Code*, p. 44.

### III. HOMICIDE BY SELF DEFENCE.

Homicide in a man's own defence seems to be, where one who hath no other possible means of preserving his life from one who combats with him on a sudden quarrel, kills the person by whom he is reduced to such an inevitable necessity. 1 *Haw.* 75.

And not only he, who upon an assault retreats to a wall, or some such strait, beyond which he can go no further, before he kills the other, is judged by the law to act upon unavoidable necessity ; but also he, who being assaulted in such a manner, and in such a place, that



he cannot go back without manifestly endangering his life, kills the other without retreating at all. 1 *Haw.* 75.

And notwithstanding a person who retreats from an assault to the wall give the other wounds in his retreat, yet if he give him no mortal one till he get thither, and then kill him, he is guilty of homicide *se defendendo* only. 1 *Haw.* 75.

But if the mortal wound was first given, then it is manslaughter. *Hale's Pl.* 42.

And an officer who kills one that resists him in the execution of his office, and even a private person that kills one who feloniously assaults him in the highway, may justify the fact, without giving back at all. 1 *Haw.* 75.

But if a person upon malice *preiense* strike another, and then fly to the wall, and there in his own defence kills the other, this is murder. *Hale's Pl.* 42.

Hereof there can be no accessaries, either before or after the act, because it is not done with a felonious intent, but upon inevitable necessity. 2 *Inst.* 56.

A person guilty hereof is not bailable by justices of the peace, but they must commit him till the assizes. (1 *Hawk.* 76.) But it is now otherwise. See 'BAIL.'

But otherwise it is, if he is taken only on slight suspicion. 2 *Hawk.* 105.

Lord Coke (2 *Inst.* 316) says, that the justices of the peace cannot take an indictment of killing a man *se defendendo*; because their commission is not general, as is that of the justices of jail delivery, but limited. But lord Hale (2 *H. H.* 46.) holds the contrary.

The forfeiture which formerly accrued on the commission of this act is now abolished. See 'ATTAINDER.'

If a man be indicted for homicide *se defendendo*, and is found not guilty, yet if it be found that he fled for the same, he shall forfeit his goods for such flight, in not standing to the law of the land. (1 *H. H.* 493.) *Quere*, if the forfeiture is not now abolished. See 'ATTAINDER.'

#### IV. MANSLAUGHTER.

By manslaughter is to be understood such killing of a man, as happened either on a sudden quarrel, or in the commission of an unlawful act, without any deliberate intention of doing any mischief at all. 1 *Hawk.* 76.

There is no difference between murder and manslaughter, but that murder is upon malice forethought, and manslaughter upon a sudden occasion. As, if two meet together, and striving for the wall, the one kill the other, this is manslaughter and felony. And so it is, if they had upon that sudden occasion gone into the field and fought, and the one had killed the other, this had been but manslaughter, and no murder; because all that followed was but a continuance of the first sudden occasion, and the blood never was cooled till the blow was given. 3 *Inst.* 55.

He is guilty of *manslaughter* only, who, seeing a man in bed with his wife, or being actually struck by him, or pulled by the nose, or filiped upon the forehead, immediately kills him; or who happens to kill

another in a contention for the wall; or in the defence of his person from any unlawful arrest; or in the defence of his house from those, who, claiming a title to it, attempt forcibly to enter it, &c. or in the defence of his possession of a room in a public house, from those who attempt to turn him out of it, and thereupon draw their swords upon him; in which case the killing the assailant hath in some cases been holden justifiable; but it is certain that it can amount to no more than manslaughter. 1 *Haw.* (6 edit.) 125.

There can be no accessaries *before* the fact in manslaughter. (1 *Hawk.* 76.) But there may be accessaries after the fact. 3 *Inst.* 55.

Upon an indictment of murder, the party offending may be acquitted of murder, and yet found guilty of manslaughter, as daily experience witnesseth, and they may not find him generally *not guilty*, if guilty of manslaughter. 1 *H. H.* 449.

The reader is particularly requested to peruse the case of *Rex v. Oneby* (2 *Strange* 766) where the distinction between murder and manslaughter is very accurately marked out and defined by chief justice *Raymond*, in delivering the opinion of all the judges in England.

A person found guilty of manslaughter on a slave is not now exempted from punishment, as formerly was the case. See *acts of 1788, ch. 23.*

Whenever any person shall be charged with involuntary manslaughter, happening in consequence of an unlawful act, the attorney for the commonwealth, with leave of the court, may waive the felony, and proceed as for a misdemeanor; and may give in evidence any act of manslaughter; and the party, on conviction, shall be fined, or imprisoned, as in cases of misdemeanor; or he may charge both offences in the same indictment, in which case the jury may acquit the party of the one, and find him guilty of the other charge. 1 *Rev. Code*, p. 357, sect. 12.

A person convicted of voluntary manslaughter shall be imprisoned in the penitentiary for not less than *two* nor more than *ten* years; and be bound to his good behaviour for life, or less time, according to the nature of the offence; and for a second offence, he shall be imprisoned not less than *six* nor more than *fourteen* years. 1 *Rev. Code*, p. 357, sect. 11.

☞ But the penitentiary law not embracing the case of a slave; the punishment of such remains as before the passing of that act.

## V. MURDER.

Is when a man of sound memory, and of the age of discretion, unlawfully killeth any person under the commonwealth's peace, with malice forethought, either expressed by the party, or implied by law, so as the party wounded or hurt die of the wound or hurt within a year and a day. 3 *Inst.* 47.

By *malice expressed* is meant a deliberate intention of doing any bodily harm to another, whereunto by law a person is not authorised. 1 *H. H.* 451.

And the evidences of such a malice must arise from external circumstances discovering that inward intention, as laying in wait, menacing antecedent, former grudges, deliberate compassings, and the

like ; which are various according to variety of circumstances. 1 *H. H.* 451.

*Malice implied* is in several cases, as when one voluntarily kills another without any provocation ; for in this case the law presumes it to be malicious, and that he is a public enemy of mankind. 1 *H. H.* 455, 456.

Poisoning also implies malice, because it is an act of deliberation. 1 *H. H.* 455.

Also, when an officer is killed in the execution of his office, it is murder, and the law implies malice. 1 *H. H.* 457.

Also, where a prisoner dieth by duress of the jailor, the law implies malice, by reason of the cruelty. 3 *Inst.* 52.

And in general, any formed design of doing mischief may be called malice, and therefore not such killing only as proceeds from premeditated hatred or revenge against the person killed, but also in many other cases, such as are accompanied with those circumstances that shew the heart to be perversely wicked, is adjudged to be of malice *prephense*, and consequently murder. 2 *Haw.* 89. *Strange* 766.

For when the law makes use of the term *malice aforethought*, as descriptive of the crime of murder, it is not to be understood in that narrow restrained sense to which the modern sense of the word *malice* is apt to lead one, a *principle of malevolence to particulars* ; for the law, by the term *malice (malitia)* in this instance meaneth that the fact has been attended with such circumstances as are the ordinary symptoms of a wicked heart, regardless of social duty, and fatally bent upon mischief. *Fost.* 256, 7.

And wherever it appears that a man killeth another, it shall be intended *prima facie* that he did it maliciously, unless he can make out the contrary, by shewing that he did it on a sudden provocation, or the like. 1 *Haw.* 82.

Also, wherever a person in cool blood, by way of revenge, beats another in such a manner that he afterwards dies thereof, he is guilty of murder, however unwilling he might have been to have gone so far. 1 *Haw.* 83.

And it seems to be agreed, that no breach of a man's word or promise, no trespass either to lands or goods, no affront by bare words or gestures, however false or malicious it may be, and aggravated with the most provoking circumstances, will excuse him from being guilty of murder, who is so far transported thereby as immediately to attack the person who offends him, in such a manner as manifestly endangers his life, without giving him time to put himself upon his guard, if he kills him in pursuance of such an assault, whether the person slain did at all fight or not. 1 *Haw.* 82.

But if the person provoked beat the other, so as apparently not to design to kill him, or if he gives him time to be on his guard, it is manslaughter only. 1 *Haw.* (6 edit.) 125.

If a man by harsh and unkind usage put another into such a passion of grief or fear, that the party either die suddenly, or contract some disease whereof he dies, though this be murder or manslaughter in the sight of God, yet in a humane judicature it cannot come under the judgment of felony, because no external act of violence was offered, whereof the law can take notice. 1 *H. H.* 429.

If two fall out upon a sudden occasion, and agree to fight in such a field, and each of them go and fetch their weapon, and go into the field and therein fight, and the one killeth the other, this is no malice prepense; for the fetching the weapon, and going into the field, is but a continuance of the falling out, and the blood was never cooled. But if there were deliberation, as that they meet the next day, nay, though it were the same day, if there were such a competent distance of time, that in common presumption they had time of deliberation, then it is murder. 3 *Inst.* 51. 1 *H. H.* 453.

If a physician or surgeon gives a person a potion, without any intent of doing him any bodily harm, but with intent to cure or prevent a disease, and, contrary to the physician or surgeon's expectation, it kills him, this is no homicide. And lord *Hale* says, he holds their opinion to be erroneous, who think that if he be no licensed surgeon or physician that occasioneth this mischance, that then it is felony. These opinions (he says) may caution ignorant people not to be too busy in this kind with tampering with physic, but are no safe rule for a judge or jury to go by. 1 *H. H.* 429.

But if a woman be with child, and any gives her a potion to destroy the child within her, and she take it, and it works so strongly that it kills her, this is murder; for it was not given her to cure her of a disease, but unlawfully to destroy the child within her; and therefore he that gives her a potion to this end must take the hazard, and if it kills the mother, it is murder. 1 *H. H.* 430.

Also, if a woman be quick with child, and by a potion, or otherwise, killeth it in her womb; or, if a man beat her, whereby the child dieth in her body, and she is delivered of a dead child, this is a great misprision, but no murder. But if the child be born alive, and dieth of the potion, battery, or other cause, this is murder. 3 *Inst.* 50.

Lord *Hale* says, that in this case it cannot legally be known, whether the child were killed or not; and that if the child die, after it is born and baptised, of the stroke given to the mother, yet it is not homicide. (1 *H. H.* 433.) And Mr. *Dalton* says, whether it die within her body, or shortly after her delivery, it maketh no difference. (*Dalt.* 332.) But Mr. *Hawkins* says, that (in this latter case) it seems clearly to be murder, notwithstanding some opinions to the contrary. 1 *Haw.* 80.

Also it seems agreed, that where one counsels a woman to kill her child when it shall be born, who afterwards doth kill it in pursuance of such advice, he is an accessory to the murder. *Ibid.*

Lord *Hale* says, if a man have a beast, as a bull, cow, horse, or dog, used to hurt people, and he hath notice thereof, and it doth any body hurt, he is chargeable with an action for it.

If he have no particular notice that it did any such thing before, yet, if it is *feræ naturæ*, as a lion, a bear, a wolf, yea an ape, or a monkey, if it get loose and do harm to any person, the owner is liable to an action for the damage.

If he have notice of the quality of any such his beast, and use all due diligence to keep him up, yet he breaks loose and kills a man, this is no felony in the owner, but the beast is a *dreadland*.

But if he did not use that due diligence, but through negligence the beast goes abroad, after warning or notice of his condition, and kills a man, he thinks it is manslaughter in the owner.

But if he did purposely let him loose or wander abroad, with design to do mischief, nay, though it were with design only to fright people and make sport, and it kills a man, it is murder in the owner. 1 *H. H.* 431.

They that are present when any man is slain, and do not their best endeavour to apprehend the murderer or manslayer, shall be fined and imprisoned. 3 *Inst.* 53.

At the common law, and by the former statute of Virginia, there was no distinction in the degrees of murder: but the principal and the accessory before the fact, if guilty at all, was punishable by death, without benefit of clergy. See 2 *Hale* 344. 1 *Rev. Code*, p. 45, 46.

The forfeitures which accrued at the common law, on conviction or attainder of murder, are expressly abolished in Virginia. See 1 *Rev. Code*, p. 106, sect. 31.

Under the penitentiary system of Virginia, the two degrees of murder are thus defined:

“All murder which shall be perpetrated by means of poison, or by lying in wait, or by duress of imprisonment or confinement, or by starving, or by wilful, malicious, and excessive whipping, beating, or other cruel treatment or torture, or by any other kind of wilful, deliberate, and premeditated killing, or which shall be committed in the perpetration or attempt to perpetrate any arson, rape, robbery, or burglary, shall be deemed murder in the *first* degree. And all other kinds of murder shall be deemed murder of the *second* degree; and the jury shall ascertain in their verdict, whether it be murder in the first or second degree.” 2 *Rev. Code*, p. 15.

“Every person convicted of murder of the *first* degree, his or her aiders, abettors and counsellors, shall suffer death, by hanging by the neck.” 1 *Rev. Code*, p. 357, sect. 14.

Every person convicted of murder in the *second* degree shall be sentenced to confinement in the penitentiary, for a period not less than *five* nor more than *eighteen* years. 1 *Rev. Code*, p. 356, sect. 4.

## VI. SELF MURDER.

A *felo de se*, or felon of himself, is a person, who, being of sound mind, and of the age of discretion, voluntarily killeth himself. 3 *Inst.* 54. 1 *H. H.* 411.

If a man give himself a wound, intending to be *felo de se*, and dieth not within the year and day after the wound, he is not *felo de se*. 3 *Inst.* 54.

Mr. *Hawkins* speaks with some warmth against an unaccountable notion (as he calls it) which hath prevailed of late, that every one who kills himself must be *non compos* of course; because it is said to be impossible, that a man in his senses should do a thing so contrary to nature, and all sense and reason. But he argues, that if this doctrine were allowable, it might be applied in excuse of many other crimes as well as this; as for instance, that of a mother murdering her child, which is also against nature and reason: and this consideration, instead of being the highest aggravation of a crime, would make it no crime at all: for it is certain a person *non compos mentis* can be guilty of no crime. 1 *Haw.* 67.



And lord *Hale* says, it is not every melancholy or hypochondriacal distemper that denominates a man *non compos*, for there are few who commit this offence, but are under such infirmities; but it must be such an alienation of mind, as renders a person to be a madman, or frantic, or destitute of the use of reason, which will denominate him *non compos*. 1 *H. H.* 412.

The offender herein doth incur a forfeiture of goods and chattels, but not of lands; for no man can forfeit his land, without an attainder by course of law. 3 *Inst.* 54.

Nor shall his goods be forfeited, until it be lawfully found by the oaths of twelve men, and this belongs to the coroner to inquire of, upon view of the body. And if the body cannot be viewed, the justices in sessions may inquire thereof; for they have power by their commissions to inquire of all felonies; and a presentment thereof found before them intitles the commonwealth to the forfeiture. 3 *Inst.* 54, 55. *Dalt.* c. 144. See CORONER.

But, nevertheless, the forfeiture shall relate to the time of the wound given, and not to the time of the death, or of the inquisition. 3 *Inst.* 55. *Dalt.* c. 144. 1 *Hale's Pl.* 29. 1 *Haw.* 68.

But lord *Hale*, in his history of the pleas of the crown, seemeth to doubt, whether it shall not relate to the time of the death only, and not to the time of the wound given. 1 *H. H.* 414.

Nor doth the offence work any corruption of blood or loss of dower. 1 *Haw.* 68.

The act of assembly which abolishes the forfeitures formerly accruing on the attainder or conviction of a person, is thought not to extend to the case of a *felo de se*. See 3 *Inst.* 54. 4 *Tuck. Bl.* 191.

## VII. DUELLING.

By the common law, not only the principal, who killed his antagonist in a duel, but also his seconds, were deemed guilty of murder; and the seconds of the party slain were held to be guilty as accessaries. 1 *Haw.* 82.

But by act of the General Assembly of Virginia, of the twenty-sixth of January, 1810, after reciting that "experience had evinced that the existing remedy for the suppression of the barbarous custom of duelling was inadequate to the purpose, and the progress and consequences of the evil had become so destructive as to require an effort on the part of the legislature to arrest a vice, the result of ignorance and barbarism, justified neither by the precepts of morality nor by the dictates of reason;" it is declared (sect. 1.) that any person who shall hereafter, wilfully and maliciously, or by previous agreement, fight a duel or single combat with any engine, instrument or weapon, the probable consequence of which might be the death of either party, and in so doing shall kill his antagonist, or any other person or persons, or inflict such wound as that the person injured shall die thereof within three months thereafter, such offender, his aiders, abettors, and counsellors, on conviction, shall be deemed guilty of murder, and suffer death.

2. If any person shall challenge another to fight a duel, with any weapon, or in any manner whatsoever, the probable issue of which may

or might be the death of the challenger or challenged, or if any person shall accept a challenge, or fight a duel, as above, such person shall be incapable of holding or being elected to any post of profit, trust or emolument, civil or military, under the government of this commonwealth.

3. After the passing of this act, every person who shall be appointed to any office or place, civil or military, under this commonwealth, shall, in addition to the oath now prescribed by law, take the following. 'I do solemnly swear or affirm (as the case may be) that I have not been engaged in a duel, by sending or accepting a challenge to fight a duel, or by fighting a duel, or in any other manner, in violation of the act entitled 'An act to suppress duelling,' since the passage of that act, nor will I be so concerned directly or indirectly in such duel during my continuance in office. So help me God.'

4. The judges of the circuit and the county courts, at their quarterly sessions, are enjoined to give expressly in charge to the jury all the laws in force to suppress duelling, and to charge them to present all persons concerned in carrying, sending, or accepting a challenge; and on presentment, if the court has jurisdiction of the offence, it shall proceed to trial in the ordinary way; if not, the presentment shall either be certified by order of court, to such court as has jurisdiction, or shall be considered in law a sufficient authority for a magistrate to issue his warrant against the accused, where an examining court is necessary.

5. When any judge or magistrate has good cause to suspect that any person or persons are about to be engaged in a duel, he may issue his warrant to bring the parties before him; and if he shall think proper to take of them a recognizance to keep the peace, he shall insert in the condition, that the party or parties shall not, during the time for which they are bound, directly or indirectly, be concerned in a duel, either with the person suspected, or any other person, within the time limited by the recognizance.

6. If any person or persons, in order to elude the operation of this law, shall leave the state, they shall be deemed as guilty, and subject to the like penalties, as if the offence had been committed within this commonwealth.

If any person shall leave the state with an intention of giving or receiving a challenge to fight a duel, or of aiding or abetting in giving or receiving such challenge, and a duel shall actually be fought, whereby the death of any person shall happen, and the person so leaving the state shall remain thereout, so as to prevent his apprehension for the purpose of trial; or if any person shall fight a duel in this state, or aid or abet therein, whereby any person shall be killed, and then flee into another state to avoid his trial, in either case it shall be the duty of the executive, and they are directed to adopt and pursue all legal steps to cause any such offender to be apprehended, and brought to trial in the county where the offence was committed, when the duel shall have been fought in this state, and when fought without, then in that county, where, in the opinion of the executive, the evidence against the offender can be best obtained and produced upon his trial.

7. It shall be the duty of the attorneys for the commonwealth, for the county courts, to give information to the executive, whenever a

case shall arise in their counties, which will render the interposition of the executive necessary; and the said attorneys, either at the first quarterly term after the commencement of this act, or at the time of accepting their offices, where they shall hereafter be appointed, shall take the following oath: 'I do solemnly swear or affirm (as the case may be) that I will to the best of my judgment execute the duty imposed on me by the act to suppress duelling. So help me God.'

8. All words which, from their usual construction and common acceptance, are considered as insults, and lead to violence and breach of the peace, shall hereafter be actionable, and no plea, exception or demurrer, shall be sustained in any court within this commonwealth, to preclude a jury from passing thereon, who are hereby declared to be the sole judges of the damages sustained: *Provided* that the courts may grant new trials as heretofore.

*(A) Warrant to apprehend the parties suspected of being about to fight a duel.*

county, to wit.

Whereas, from the information of A I, this day given me upon oath (or from my own knowledge, *as the case is*) I have good cause to suspect that B D and C D, of are about to be engaged in a duel, in violation of the act of the General Assembly to suppress duelling. These are therefore to require you immediately to apprehend the said B C and C D, and bring them before me, or some other justice of the peace for the county of aforesaid, to be dealt with according to law. Given under my hand and seal, as a justice of the peace for the county of this day of in the year

To constable.

*(B) Recognizance.*

(The recognizance may be the same as form (D) under title "*Surety for the peace*," with the following condition:)

The condition of this recognizance is such, that if the above bound B D shall personally appear at the next court, to be holden in and for the county of aforesaid, to do and receive what shall then and there be enjoined him by the said court, and in the mean time shall keep the peace towards the commonwealth and all its citizens, especially towards C D, of ; and moreover, shall not, during the said time, directly or indirectly be concerned in a duel, either with the said C D, or any other person whatsoever; then the said recognizance to be void, else to remain in full force.

A recognizance should be taken from *each*, conditioned that he would not be concerned in a duel with the *other*; and the sum should be high enough to insure the appearance of the parties at court, when a similar clause in the condition must be inserted.



*(C) Warrant, for murder.*

county, to wit.

Whereas A I, of                      hath this day made oath before me J P, a justice of the peace for the county aforesaid, that on the                      day of instant, B D, of                      was shot through the body with a leaden bullet, whereof he instantly died (*or if killed in any other manner, describe it with convenient certainty*) and that he the said A I hath good grounds to suspect, and doth suspect, that C O, of                      , perpetrated the murder aforesaid. These are therefore to require you forthwith to apprehend the said C O, and bring him before me, or some other justice of the peace for the said county of                      , to be dealt with according to law. Given under my hand and seal, &c.

To                      to execute.

☞ If the party be not actually dead, but in great danger of dying, then describe the injury according to the truth of the case, and say, 'And whereas the said B D hath continued in a languishing condition ever since, and his life is at present greatly despaired of and instead of 'murder,' say 'act.' (Conclude as above.)

For a *mittimus*, see titles 'COMMITMENT, CRIMINALS.'

*(D) Indictment for murder, by beating with fists and kicking on the ground, where no visible mortal wound can be discovered.*

county, to wit.

The jurors, &c. upon their oath, present, that                      late of the parish of                      in the county of                      labourer, not having the fear of God before his eyes, but being moved and seduced by the instigation of the devil, on the                      day of                      in the                      year                      , with force and arms, at the parish aforesaid, in the county aforesaid, in and upon one                      in the peace of God and the commonwealth then and there being, feloniously, wilfully, and of his malice aforethought, did make an assault; and that the said                      then and there feloniously, wilfully, and of his malice aforethought, did strike, beat, and kick the said                      with his hands and feet, in and upon the head, breast, back, belly, sides, and other parts of the body of him the said                      and did then and there feloniously, wilfully, and of his malice aforethought cast and throw the said                      down unto and upon the ground, with great force and violence there, giving unto the said                      then and there, as well by the beating, striking, and kicking of him the said                      in manner and form aforesaid, as by the casting and throwing of him the said                      down as aforesaid, several mortal strokes, wounds, and bruises, in and upon the head, breast, back, belly, sides, and other parts of the body of him the said                      of which said mortal strokes, wounds, and bruises, he the said                      from the said                      day of                      in the year aforesaid, until the                      day of                      in the same year, as well at the parish aforesaid, in the county aforesaid, as also at the parish of                      in the said county of                      did languish, and languish-

ing did live ; on which said day of in the year  
 aforesaid, the said in the parish aforesaid, in aforesaid, in  
 the county aforesaid, of the several mortal strokes, wounds, and bruises  
 aforesaid, died. And so the jurors aforesaid, upon their oath afore-  
 said, do say, that the said him the said in manner and  
 form aforesaid, feloniously, wilfully, and of his malice aforethought,  
 did kill and murder, against the peace and dignity of the common-  
 wealth.

*(E) Indictment for murder, by casting a stone.*

county, to wit.

The jurors, &c. upon their oath present, that C B, late of the parish  
 of in the county of labourer, not having the fear of God before  
 his eyes, but being moved and seduced by the instigation of the devil,  
 on the day of in the year with force and arms, at the  
 parish aforesaid, in the county aforesaid, in and upon one M, the  
 wife of M H, in the peace of God and this commonwealth, then and  
 there being, feloniously, wilfully, and of his malice aforethought, did  
 make an assault ; and that the said C B, a certain stone of no value,  
 which he the said C B, in his right hand then and there had and held,  
 in and upon the right side of the head, near the right temple of her  
 the said M, then and there feloniously, wilfully, and of his malice  
 aforethought, did cast and throw ; and that the said C B, with the stone  
 aforesaid, so as aforesaid cast and thrown, the aforesaid M, in and upon  
 the right side of the head, near the right temple of her the said M,  
 then and there feloniously, wilfully, and of his malice aforethought, did  
 strike, penetrate and wound, giving to the said M, by the casting and  
 throwing of the stone aforesaid, in and upon the right side of the head,  
 near the right temple, of her the said M, one mortal wound, of the  
 length of one inch, and of the depth of one inch, of which said mortal  
 wound she the said M, from the said day of in the year  
 aforesaid, until the day of the same month of in the same  
 year, at the parish aforesaid, in the county aforesaid, did languish, and  
 languishing did live ; on which said day of in the year  
 aforesaid, the said M, at the parish aforesaid, in the county aforesaid,  
 of the mortal wound aforesaid, died ; and so the jurors aforesaid, upon  
 their oath aforesaid, do say, that the said C B, her the said M H, in  
 manner and form aforesaid, feloniously, wilfully, and of his malice  
 aforethought, did kill and murder, against the peace and dignity of the  
 commonwealth.

*• (F) Indictment for murder and petit-treason, by shooting,  
 viz. against the person who shot, and the widow of the  
 deceased, for aiding and assisting.*

county, to wit.

The jurors, &c. upon their oath present, that M H, late of the pa-  
 rish of L C, in the county of yeoman, and late of the same,  
 widow (late the wife of late of the same place, labourer) not having

The fear of God before their eyes, but being moved and seduced by the instigation of the devil, on the day of in the year , with force and arms, at the parish aforesaid, in the county aforesaid, feloniously, wilfully, and of their malice aforethought, and she the said also traiterously did make an assault upon the said the husband of her the said in the peace of God and this commonwealth then and there being, and that the same a certain gun, of the value of five shillings, then and there charged and loaded with gun powder, and divers leaden shot, which gun he the said in both his hands then and there had and held, to, against and upon the said then and there feloniously, wilfully, and of his malice aforethought, did shoot and discharge, and that the said with the leaden shot aforesaid, out of the gun aforesaid, then and there by force of the gun powder, shot, discharged, and sent forth as aforesaid, the aforesaid in and upon the left side of the head of him the said near the left ear of him the said then and there, with the leaden shot aforesaid, out of the gun aforesaid, by the said so as aforesaid shot, discharged and sent forth, feloniously, wilfully, and of his malice aforethought, did strike, penetrate, and wound, giving to the said with the leaden shot aforesaid, so as aforesaid shot, discharged, and sent forth, out of the gun aforesaid, by the said in and upon the left side of the head of him the said near the left ear of him the said one mortal wound, of the depth of four inches, and of the breadth of two inches, of which said mortal wound the said then and there instantly died; and that the said the wife of him the said then and there, feloniously, traiterously, wilfully, and of her malice aforethought, was present, aiding, helping, abetting, comforting, assisting, and maintaining the said the felony and murder aforesaid, in manner and form aforesaid, to do and commit. And so the jurors aforesaid, upon their oath aforesaid, do say, that the said feloniously, wilfully, and of his malice aforethought, and the said feloniously, traiterously, wilfully, and of her malice aforethought, him the said then and there, in manner and form aforesaid, did kill and murder, against the peace and dignity of the commonwealth.

*(G) Indictment against a man for confining and starving his wife to death.*

county, to wit.

The jurors for, &c. upon their oath present, that late of the parish of in the county of not having the fear of God before his eyes, but being moved and seduced by the instigation of the devil, and of his malice aforethought, contriving and intending his wife, feloniously, wilfully, and of his malice aforethought, to starve, kill, and murder, on the day of in the year , with force and arms, at the parish aforesaid, in the county aforesaid, in and upon the said in the peace of God and of the commonwealth then and there being, feloniously, wilfully, and of his malice aforethought, did make an assault, her the said in a certain closet, in a certain lodging room, part and parcel of a certain messuage or dwelling-house, there situate, feloniously, wilfully, and of his

malice aforethought, on the said day of in the year aforesaid, said, and continually from thence until the day of the same month, did confine and imprison, and continually, from the said day of in the year aforesaid, until the said day of the same month, feloniously, wilfully, and of his malice aforethought, did neglect and refuse to give and administer, or permit to be given and administered, to her the said being so confined and imprisoned as aforesaid, sufficient meat, drink, victuals, and other necessities proper and requisite for the sustenance, support, and maintenance of her body; by means of which said confinement and imprisonment, and also for want of such sufficient meat, drink, victuals, and other necessities as were proper and requisite for the sustenance, support, and maintenance of the body of her the said she the said from the said day of in the year aforesaid, until the said day of the same month, in the said closet, at the parish aforesaid, in the county aforesaid, did linger and pine, and became greatly emaciated, and consumed in her body, and during all that time did languish, and languishing did live; on which said day of in the year aforesaid, she the said at the parish aforesaid, in the county aforesaid, of such confinement and imprisonment, and for want of such sufficient meat, drink, victuals, and other necessities as were proper and requisite for the sustenance, support and maintenance of her body, did miserably perish and die; and so the jurors aforesaid, upon their oath aforesaid, do say, that the said her the said in manner and form aforesaid, feloniously, wilfully, and of his malice aforethought, did kill and murder, against the peace and dignity of the commonwealth.

*(H) Indictment against a widow for drowning her own child in a pond.*

county, to wit.

The jurors, &c. upon their oath present, that late of the parish of in the county of widow, not having the fear of God before her eyes, but being moved and seduced by the instigation of the devil, on the day of in the year, with force and arms, at the parish aforesaid, in the county aforesaid, in and upon one the daughter of her the said (she the said then and there being an infant of tender years, to wit, about the age of two years, and in the peace of God and the commonwealth) feloniously, wilfully, and of her malice aforethought, did make an assault; and that the said then and there, feloniously, wilfully, and of her malice aforethought, did take the said in both hands of her the said and did then and there feloniously, wilfully, and of her malice aforethought, cast, throw, and push the said into a certain pond there situate, wherein there then was a great quantity of water; by means of which said casting, throwing, and pushing of the said into the pond aforesaid, by the said in form aforesaid, she the said in the pond aforesaid, with the water aforesaid, was then and there choaked, suffocated, and drowned, of which said choaking, suffocating, and drowning, she the said then and there instant-

ly died; and so the jurors aforesaid, upon their oath aforesaid, do say, that the said        her the said        in manner and form aforesaid, feloniously, wilfully, and of her malice aforethought, did kill and murder, against the peace and dignity of the commonwealth.

*(I) Indictment for felony and murder, by stabbing with a knife.*

The jurors, &c. upon their oath present, that A S, late of the parish of        in the county of        labourer, not having the fear of God before his eyes, but being moved and seduced by the instigation of the devil, on the        day of        in the year       , with force and arms, at the parish aforesaid, in the county aforesaid, in and upon one J M, in the peace of God and of the commonwealth then and there being, feloniously, wilfully, and of his malice aforethought, did make an assault, and that the said A S, with a certain knife, of the value of six pence, which he the said A S, in his right hand, then and there had and held, the said J M, in and upon the left side of the belly, between the short ribs of him the said J M, then and there feloniously, wilfully, and of his malice aforethought, did strike and thrust, giving to the said J M, then and there, with the knife aforesaid, in and upon the aforesaid left side of the belly, between the short ribs of him the said J M, one mortal wound, of the the breadth of three inches, and of the depth of six inches, of which said mortal wound the said J M, from the said        day of        in the year aforesaid, until the        day of the same month of        in the year aforesaid, at the parish aforesaid, in the county aforesaid, did languish, and languishing did live; on which said        day of        in the year aforesaid, the said J M, at the parish aforesaid, in the county aforesaid, of the said mortal wound died; and so the jurors aforesaid, upon their oath aforesaid, do say, that the said A S, the said J M, in manner and form aforesaid, feloniously, wilfully, and of his malice aforethought, did kill and murder, against the peace and dignity of the commonwealth.

## HORSE-STEALING.

HORSE-STEALING was formerly punished with death (*see* 1 *Rev. Code*, p. 175.) By the penitentiary law of 1796, every person convicted of horse-stealing, or as accessory thereto, before the fact, shall restore the horse, mare, or gelding stolen, to the owner or owners thereof, or pay him, her, or them, the full value thereof, and was to undergo a confinement in the penitentiary for a period not less than two nor more than seven years (*see* 1 *Rev. Code*, p. 356, sect. 6.) but

by act of 1803, the period of confinement for horse-stealing is extended to not less than *five* nor more than *ten* years. See 2 *Rev. Code*, p. 70, sect. 1.

A person apprehending a horse-stealer, who is convicted, is entitled to a reward of twenty dollars from the treasury, on a certificate from any circuit court, that the claimant was the apprehender, and either that he was not examined as a witness at the trial, or that the other evidence then given was sufficient, without his testimony, to convict the prisoner. 1 *Rev. Code*, p. 179, sect. 4.

The legal representatives of one killed in endeavouring to apprehend a horse-stealer, shall receive one hundred and seventy dollars from the treasury, on warrant of the auditor, which he is directed to issue, upon a certificate under the hands and seals of two justices of the peace of the county where the fact was committed, that such person was so killed; which certificate the justices, upon sufficient proof before them made, are required immediately to give. 1 *Rev. Code*, p. 179, sect. 5.

For proceedings against receivers of stolen horses, see title 'ACCESSORY.'

### (A) Certificate of the two justices.

county, to wit.

We J P and K P, two of the commonwealth's justices of the peace for the county of aforesaid, do hereby certify to the auditor of public accounts, that it hath been fully proved to us that A D, late of, &c. was killed within this county, on the day of last, by endeavouring to apprehend G H, a horse-stealer. Given under our hands and seals, this day of in the year

J. P. [*seal.*]

K. P. [*seal.*]

### (B) Warrant against a horse-stealer.

county, to wit.

Whereas A J, of hath this day made oath before me, J P, a justice of the peace for the county aforesaid, that on or about the day of in the year a certain (*describe the kind, whether horse, mare, gelding, foal, or filly, by its colour, age, size, &c.*) was stolen from the said A J, in the county of and that he hath good cause to suspect, and doth suspect, that B O, of did steal, take and lead away the said These are, therefore, to command you forthwith to apprehend the said B O, and bring him before me, or some other justice of the peace for the said county of to answer the said charge, and further to be dealt with according to law. Given under my hand and seal, &c.

To to execute.



(C) *Mittimus.*

county, to wit.

To constable, and to the keeper of the jail of the said county.

Whereas B O, of        hath been brought before me, J P, a justice of the peace for the said county, by virtue of my warrant, charged on oath of A J, of        with having stolen from him a certain        horse, &c. (*describe the kind.*) These are to command you, the said constable, to convey the said B O to the jail of the said county, forthwith, and deliver him to the keeper thereof, who is hereby also required to receive the said B O, and keep him in his jail and custody, till he be thence discharged by due course of law. Given under my hand and seal, &c.

For a warrant to convene a court of examination, and other precedents, see title 'CRIMINALS.'

*Indictment for horse-stealing.*

county, to wit.

The jurors for the commonwealth, &c. upon their oath, present, that A O, late of the parish of        in the county of        aforesaid, labourer, on the        day of        in the year        and in the year of the commonwealth, with force and arms, at the parish aforesaid, in the county aforesaid, one gelding of a bay colour, of the price of        dollars, of the goods and chattels of one A J, then and there found, feloniously did steal, take, and \* lead away, against the peace and dignity of the commonwealth.

HOUSE-BREAKING, see BURGLARY and LARCENY.

HOUSE-BURNING, see BURNING.

## HUE AND CRY.

THIS method of pursuing felons being authorised by the common law, and recognized by some statutes, it might be improper to omit it, though it is seldom used in this commonwealth.

Lord Coke saith that hue and cry (called in ancient records *hutesium et clamor*) do mean the same thing, for that *huer* in French is to hoot or shout, in English to cry. 2 *Inst.* 173. 3 *Inst.* 116.

But since it appeareth by old books (of which also Lord Coke maketh mention, 2 *Inst.* 173) that hue and cry was auciently both by horn and by voice, it may seem that these two words are not synonymous, but that this *hutesium* or *hooting* is by the horn, and *crying* by the voice;

\* For stealing a horse, &c. (instead of *carry away*) say *lead away*; for oxen, cows, sheep, &c. *drive away*.

With which also accordeth the *French* word *hutchet*, which signifieth a huntsman's horn. So that hue and cry in this sense will properly signify a pursuit by horn and by voice. Which kind of pursuit of robbers, by blowing a horn, and by making an outcry, is said to be practised also in Scotland. 2 *Burn's Just.* 434.

And this blowing of a horn by way of notice or intelligence, in other cases as well as in the pursuit of felons, seemeth to have been in use of very ancient time, for amongst the laws of *Wihred* king of *Kent*, in the year 696, this is one; that "if a stranger go out of the road, and neither shout nor blow a horn, he shall be taken for a thief." *Ibid.* 435.

Hue and cry is the old common law process after felons, and such as have dangerously wounded any person. And this hath received great countenance and authority by several statutes. 2 *H. H.* 98. See 1 *Rev. Code*, p. 126, sect. 18.

When any felony is committed, or any person is grievously and dangerously wounded, or any person assaulted and offered to be robbed, either in the day or night; the party grieved, or any other, may resort to the constable of the vill; and, 1. Give him such reasonable assurance thereof, as the nature of the case will bear. 2. If he knows the name of him that did it, he must tell the constable the same. 3. If he knows it not, but can describe him, he must describe his person, or his habit, or his horse, or such circumstance as he knows, which may conduce to his discovery. 4. If the thing be done in the night, so that he knows none of these circumstances, he must mention the number of the persons, or the way they took. 5. If none of all these can be discovered, as where a robbery, or burglary, or felony, is committed in the night, yet they are to acquaint the constable with the fact, and desire him to search in his town for suspected persons, and to make hue and cry after such as may be properly suspected, as being persons vagrant in the same night; for many circumstances may *ex post facto* be useful for discovering a malefactor, which cannot be at first found. 2 *H. H.* 100, 101. 3 *Inst.* 116.

For levying hue and cry, although it is a good course to have the warrant (A) of a justice of the peace, when time will permit, in order to prevent causeless hue and cry; yet by the frame of the statutes, it is by no means necessary, nor is it always convenient; for the felon may escape before the warrant be obtained, and hue and cry was part of the law, before justices of the peace were first instituted. 2 *H. H.* 99.

And the duty of the constable is, to raise the power of the town, as well in the night as in the day, for the prosecution of the offender. 3 *Inst.* 116.

And upon hue and cry levied against any person, or where any hue and cry comes to a constable. whether the person be certain or uncertain, the constable may search suspected places within his vill, for the apprehending of the felons. 2 *H. H.* 103.

But though he may search suspected places or houses, yet his entry must be by the doors being open; for he cannot break open doors barely to search, unless the person against whom the hue and cry is levied be there, and then it is true he may; therefore, in case of such a search, the breaking open the door is at his peril, namely, justifiable,



If he be there ; not justifiable, if he be not there : but it must be always remembered, that in case of breaking open a door, there must be first notice given to them within of his business, and a demand of entrance and refusal, before the doors can be broken. 2 *H. H.* 103. 2 *Haw.* 80.

If the person against whom the hue and cry is raised be not found in the constabewick, then the constable shall give notice to the next constable, and to the next, until the offender be found, or until they come to the sea side. And this was the law before the conquest. 3 *Inst.* 116.

And the officer of the town where the felony was done, as also every officer to whom the hue and cry shall afterwards come, ought to send to every other town round about him, and not to one town only. And in such cases it is needful to give notice in writing (to the pursuers) of the things stolen, and of the colour and marks thereof, as also to describe the person of the felon, his apparel, horse, and the like, and which way he is gone, if it may be. *Dalt.* c. 54.

But if the hue and cry be upon a robbery, burglary, manslaughter, or other felony committed, but the person that did the fact is neither known nor describable by person, clothes, or the like, yet such a hue and cry is good, as hath been said, and must be pursued, though no person certain be named or described. 2 *H. H.* 103.

And therefore, in this case, all that can be done is, for those that pursue the hue and cry to take such persons as they have probable cause to suspect ; as for instance, such persons as are vagrants, or such suspicious persons as come late into their inn or lodgings, and give no reasonable account where they have been, and the like. *Ibid.*

If the person pursued by hue and cry be in a house, and the doors are shut, and refused to be opened on demand of the constable, and notification of his business, he may break open the doors ; and this he may do in any case where he may arrest, though it be only a suspicion of felony, for it is for the commonwealth, and therefore a virtual *non omittas* is in the case : and the same law is, upon a dangerous wound given, and a hue and cry levied upon the offender. 2 *H. H.* 102.

And it seems, in this case, that if he cannot be otherwise taken, he may be killed ; and the necessity excuseth the constable. 2 *H. H.* 102.

If hue and cry be raised against a person certain for felony, though possibly he is innocent ; yet the constables, and those that follow the hue and cry, may arrest and imprison him in the common jail, or carry him to a justice of the peace, to be examined where he was at the time of the felony committed, and the like. *Ibid.*

If the hue and cry be not against the person certain, but by description of his stature, person, clothes, horse, and the like ; yet the hue and cry doth justify the constable or other person following it, in apprehending the person so described, whether innocent or guilty ; for that is his warrant ; it is a kind of process that the law allows of, not usual in other cases, namely, to arrest a person by description. *Ibid.* 103.

In case of hue and cry once raised and levied, on supposal of a felony committed, though in truth there was no felony committed, yet those

that pursue hue and cry, may arrest and proceed, as if so be a felony had been really committed.

And therefore the justification of an imprisonment by a person upon suspicion, and by a person (especially a constable) upon hue and cry levied, do extremely differ, for in the former case, there must be a felony averred to be done, and it is issuable ; but in the latter, to wit, upon hue and cry, it need not be averred, but the hue and cry levied upon information of a felony is sufficient, though perchance the information were false.

And the reasons hereof are these. 1. Because the constable cannot examine the truth or falsehood of the suggestion of him that first levied it, for he cannot administer to him an oath ; and if he should forbear his pursuit of the hue and cry till it be examined by a justice of the peace, the felon might escape, and the pursuit might be lost and fruitless. 2. Because the constable is compellable to pursue hue and cry, and he is punishable, and so are those of the vill, if they do it not. 3. Because he that first raised a hue and cry, where no felony is committed, that is, he who giveth the false information, is severely punishable by fine and imprisonment, if the information be false.

And therefore, if he raise hue and cry upon a person that is innocent, yet they that pursue the hue and cry may justify the imprisonment of that innocent person ; and the raiser is punishable : and by the same reason, if he give notice of a felony committed, where there was in truth none.

And here the justification of the imprisonment is mixed, partly upon the hue and cry, and partly upon their own suspicion ; and therefore, 1. In respect that it is upon hue and cry, there needs no averment that the felony was done, if the arrest be by that constable that first received the information, and so raised the hue and cry ; or if the arrest were made by that constable, or those vills, to whom the hue and cry came at the second hand, it must be averred that such a hue and cry came to them, purporting such a felony to be done. 2. But also, inasmuch as the hue and cry neither names nor describes the person of the felon, but only the felony committed, and therefore the arrest of this or that particular person is left to the suspicion and discretion of the constable, or of the people of the second or third vill, he that arrests any person upon such general hue and cry must aver, that he suspected, and shew a reasonable cause of suspicion. 2 *Hale* 101, 102, 103, 104.

“ In like manner hue and cry shall be levied for all murders, burglaries, and for men slain, or in peril to be slain, and all shall follow the hue and steps, as near as can be, and he that doth not shall be amerced at the discretion of a jury.” 1 *Rev. Code*, 126, sect. 18. See also, 1 vol. *Stat. at Large*, p. 483, *the ancient method of apprehending run-away servants, in Virginia, by hue and cry.*

The most usual, and indeed the safest method of proceeding, on raising hue and cry, is to go before a magistrate, and to give him information of the felony upon oath ; who should thereupon take the examination in writing, before he issues his warrant.

*Examination.*

county, to wit :

The examination of \_\_\_\_\_ of the said county of \_\_\_\_\_ taken upon oath, before me, J P, a justice of the peace for the said county, this \_\_\_\_\_ day of \_\_\_\_\_ in the year \_\_\_\_\_. The said \_\_\_\_\_ saith that &c. (*here set forth the substance of the information.*)  
Sworn to before me

*(A) Warrant levying hue and cry on a robbery having been committed.*

To all constables and other officers, as well in the said county of \_\_\_\_\_ as elsewhere, to whom the execution hereof doth belong.

Whereas A I, of \_\_\_\_\_ in the county of \_\_\_\_\_ yeoman, hath this day made information, upon oath, before me, J P, one of the justices of the peace in and for the said county of \_\_\_\_\_ that on this present \_\_\_\_\_ day of \_\_\_\_\_ in the year \_\_\_\_\_ betwixt the hours of three and four in the afternoon of the same day, at a place called \_\_\_\_\_ in the said county of \_\_\_\_\_ in the highway there, two malefactors and felons, to him the said A I unknown, in and upon him the said A I, then and there being in the peace of God and of the commonwealth, feloniously did make an assault, and him the said A I then and there feloniously did put in great fear and danger of his life; and the sum of \_\_\_\_\_ of lawful money of this commonwealth, of the goods and chattels of him the said A I, from the person and against the will of him the said A I, then and there violently and feloniously did steal, take and carry away; and that one of the said malefactors and felons, to him the said A I unknown, is a tall strong man, and seemeth to be about the age of \_\_\_\_\_ years, is pitted in the face with the small pox, and hath the scar of a wound under his left eye, and had then on a dark brown riding coat, &c. and did ride upon a bay gelding, with a star on his forehead; and the other, &c. and that after the said felony and robbery committed, they, the said malefactors and felons, to him the said A I unknown, did fly, and withdraw themselves to places unknown, and are not yet apprehended. These therefore are to command you forthwith to raise the power of the county within your several precincts, and to make diligent search therein for the persons above described, and to make fresh pursuit and hue and cry after them, from town to town, and from county to county, as well by horsemen as by footmen; and to give due notice hereof in writing, describing in such notice the persons and the offence aforesaid, unto every next constable on every side, until they shall come to the sea shore; or until the said malefactors and felons shall be apprehended; and all persons whom you or any of you shall, as well upon such search and pursuit, as otherwise, apprehend or cause to be apprehended, as justly suspected for having committed the said robbery and felony, that you do carry forthwith, to one of the justices of the peace in and for the county where he or they shall be apprehended, to be by such justice examined, and dealt withal according to law. And hereof fail you

not respectively, upon the peril that shall ensue thereon. Given under my hand and seal, at \_\_\_\_\_ in the said county of \_\_\_\_\_ the day of \_\_\_\_\_ aforesaid, in the year aforesaid.

As this process, by *hue and cry*, to apprehend an offender, is scarcely ever used in this commonwealth, in the mode prescribed by the common law, it will be sufficient to refer to title CRIMINALS, where the necessary precedents may be found. It may, however, be proper to observe, that should an offender be brought before a magistrate, who was taken by *hue and cry*, he must proceed in all things as directed under title CRIMINALS, observing to vary the style of his precedents, as in the following

### *Mittimus.*

To the sheriff or keeper, &c.  
county, to wit:

I send you herewith the body of A O, late of \_\_\_\_\_ taken by *hue and cry*, upon warrant of J P, a justice of the peace of the county of \_\_\_\_\_ and brought before me, by A C, constable of \_\_\_\_\_ the said A O, being charged, &c. (*describe the offence as in the warrant, and conclude as in other mittimus.*)

## HUNTING.

If any person shall shoot, hunt, or range on the lands, or fish or fowl in any creeks or waters, included within the bounds of another, without licence from the owner, the offender shall forfeit three dollars for each offence, recoverable, with costs, before any justice of the county, to the use of the informer; in which information the confession of the accused, or the oath of one credible witness, shall be sufficient evidence. And where the *owner* shall prosecute, *his* oath shall be sufficient evidence to convict the offender; but in that case, the penalty shall go to the overseers of the poor of the district; and, moreover, the offender shall be liable to the action of the party grieved, at the common law, for damages. 1 Rev. Code, p. 152, sect. 1.

On a third conviction, the justice shall not only give judgment for the penalty aforesaid, but require a recognizance of the offender, with one or more sureties, payable to the governor and his successors, in the penalty of thirty dollars, for his good behaviour for one year; and in case of refusal, shall commit him to jail, there to remain till such recognizance be given, or until the expiration of one month. And if, after such recognizance given, the offender be guilty of either of the above offences, it shall be deemed a breach, and the penalty shall be to the use of the overseers of the district. *Ibid.* p. 153.



Whoever shall use any fire-hunting, or the killing of deer by such means, on any patented lands, shall forfeit four dollars for each offence, recoverable before any justice of the county; one half to the overseers of the poor of the district, the other to the informer. And the confession of the party accused, or the oath of one credible witness, shall be evidence; and where the owner of the land shall prosecute, his oath shall be sufficient evidence to convict the offender; but in that case the whole penalty shall go to the overseers of the poor. 1 Rev. Code, p. 209.

If any person shall kill a tame deer, having a bell or collar on its neck, he shall be liable to an action of trespass, at the suit of the party injured, to be prosecuted in the court of the county where the offence was committed. *Ibid.*

If any free white person, by shooting, trapping, hunting, ranging with dogs, or otherwise, shall kill or destroy any deer (not being his own) or shall be found in possession of any, between the first of January and the first of August, he shall forfeit five dollars, recoverable before any justice of the county where the offence was committed, or the offender resides, to the use of the informer, provided the conviction be on the confession of the offender, or oath of one or more witnesses; but if the conviction be on the oath of the informer only, then the penalty to go to the overseers of the poor of the county. And if any white person, free negro or mulatto, be guilty of a like offence; he shall pay the same penalty, recoverable, and to be disposed of as aforesaid; and in case of inability to pay, shall, by order of the justice, receive not less than ten nor more than twenty lashes. 1 Rev. Code 406.

The same number of lashes are to be inflicted on a slave guilty of a like offence. *Ibid.* 407.

This act not to extend to the counties west of the Alleghany mountains. *Ibid.*

(A) *Warrant for hunting on the lands of another, without license.*

county, to wit:

Whereas information is made to me, by A J, that A O did, on the day of last, hunt and range upon the lands of A M, in this county, without the consent or licence of the said A M, contrary to the act of the General Assembly in that case made and provided. You are therefore hereby required, in the name of the commonwealth, to summon the said A O to appear before me, or some other justice of the peace for this county, to answer the premises. Herein fail not. Given, &c.

To A C, constable.

*Judgment.*

On hearing, it being duly proved that the within named A O is guilty of the offence within mentioned, by which he hath incurred the penalty of three dollars. It is therefore considered, that the said A J

recover against him the said penalty, to his own use, together with his costs in this behalf expended.

costs. cents.

Where the owner of the land prosecutes, the warrant may be the same as form (A) only stating that the owner gave information.

The judgment as before to the word 'dollars,' then say, '*to be paid to the overseers of the poor of the district of for the use of the poor of said district.*'

On the first judgment, an execution may issue in favour of the informer, as in other cases.

But in the other case a warrant for distress and sale seems the most proper.

*(B) To the constable of*

county, to wit.

Whereas A O. hath been duly convicted before me, by the oath of A M, of having unlawfully hunted and ranged upon the lands of the said A M, in the parish of in this county, and was adjudged to pay the sum of three dollars, and the costs, for the said offence, amounting to cents. You are therefore hereby required to levy the said sum of three dollars and cents, by distress and sale of the goods and chattels of the said A O, proceeding therein as the law directs; and that you pay the said sum of three dollars, when levied, to the overseers of the poor of the district of for the use of the poor of the said district; and that you make return of this warrant, with an account of what you shall have done therein, to me, or some other justice of the peace for this county, on or before the day of next. Given, &c.

*(C) Recognizance, on a third conviction.*

*(The penalty must be for thirty dollars, and may be the same as form (A) under title 'RECOGNIZANCE,' with the following condition.)*

The condition of the above recognizance is such, that whereas the above bound A O hath been a third time duly convicted before me, a justice, &c. of hunting on the lands of A M, without a license first had and obtained from the said A M for that purpose; if, therefore, the said A O shall be of good behaviour for one whole year from the date hereof, then the above obligation to be void, else to remain in full force.

Acknowledged before me, J P.

*(D) Commitment, for want of recognizance.*

county, viz,

To constable, and to the keeper of the jail of the said county.

Whereas A O, of, &c. hath a third time been duly convicted before &c. of hunting on the lands of A M, of, &c. without the license of the said A M, contrary to the act of Assembly in that case made and provided; and the said A O being now required before me to enter into a recognizance, according to law, for his good behaviour for one whole

year, hath refused so to do. These are, therefore, to require you, the said constable, to convey, the said A O to the common jail of this county, and deliver him to the keeper thereof, who is hereby required to keep him in safe custody, until he shall enter into a recognizance, with one or more sufficient sureties, to A G, governor of this commonwealth, and his successors, in the penalty of thirty dollars, for his good behaviour for one whole year from the date hereof, or until the expiration of one month, or until he shall be otherwise discharged by due course of law. Given under my hand and seal, &c.

*(E) Warrant for killing deer at unseasonable periods.*

to wit.

Whereas information hath been made before me, J P, a justice, &c. by A J, that A O, of, &c. between the first day of January and the first day of August, in this present year, did hunt and kill one deer, not being his own tamed, at aforesaid, contrary to the act of Assembly in that case made and provided. You are, &c. *(Conclude as in form (A).)*

☞ The judgment, execution, &c. may be varied, as directed under form (A) except that in this case, where the conviction is on the oath of the informer, the penalty must be directed to go to the overseers of the poor of the county, towards lessening the county levy.

☞ The foregoing precedents may be easily altered to suit the offence of fire-hunting

HUSBAND, see WIFE.

IDEOTS, see LUNATICS.

IMPRISONMENT, see ARREST, COMMITMENT.

INCEST, see MARRIAGE.

## IMPRESSMENTS.

WHENEVER it shall be necessary to impress any property for the use of the commonwealth, it shall be the duty of the officer or person who impresses the same to apply to a justice of the peace of the county wherein the property shall be impressed, who shall cause the same to be appraised by two disinterested respectable house-keepers, sworn for that purpose; and if the property so impressed be totally destroyed or lost in the service of the commonwealth, so that the same cannot be returned to the owner, the officer or person who impressed it shall so certify. Upon the owner producing such appraisement and certificate, the auditor of public accounts is authorised and required to issue a warrant for the amount of the appraisement, on the treasurer, who is directed to pay the same out of any monies in the treasury. Should the property impressed be restored to the owner, and he should conceive it had been injured in the service of the com-

monwealth, he may, within five days thereafter, call on the same persons who first valued the said property, if to be found, who shall be sworn to determine the value at the time the same was restored to the owner; otherwise, any justice in the county where the property was impressed may cause two house-keepers to value the same upon oath as aforesaid. The justice or justices, as the case may be, shall certify to the auditor of public accounts such first and second valuation, with their true date, and the time such property has been restored; who shall, if the second valuation amount to a less sum than the first, issue a warrant for the difference, to be paid out of any money in the treasury. *Provided nevertheless*, That in all second valuations, the hire of such property shall be taken into consideration by the appraisers.

If it shall appear that such property has been injured by the officer or person who impressed it, or any other person, whereby the commonwealth has sustained an injury, it shall and may be lawful for any attorney, prosecuting on behalf of this commonwealth where such person resides, to recover the said damages, upon motion before any court of record within the commonwealth, ten days notice thereof having been previously given. But such person may, if required, have such motion tried by a jury, provided he will not delay the trial. See 2 Rev. Code, ch. 95, p. 121.

*(A) Warrant to two housekeepers, to appraise property impressed.*

county, to wit.

To A B and C D.

Whereas E S, sheriff of this county, hath this day given information to me, J P, a justice of the peace for the county aforesaid, that he hath impressed one horse (*describe him*) the property of F H, of the said county, for the purpose of conveying a convict from the jail of to the penitentiary (*or if any other property, or for any other purpose. mention it.*) These are, therefore, to require you, having been first duly sworn for that purpose before me, or some other justice of the peace for this county, truly to appraise the said horse; and the valuation so made to return to the said F H, under your hands. Given, &c.

*(B) Appraisement of the housekeepers.*

We A B & C D, two house-keepers residing in the county of having been this day called on, pursuant to a warrant to us directed by J P, to appraise a certain horse (*describe him*) the property of F H, of the said county, impressed by E S, for the purpose of conveying a convict from the jail of to the penitentiary house in the city of Richmond; having been first duly sworn for that purpose, do appraise the said horse to the sum of Given, &c.



*(C) Certificate of the sheriff or officer.*

I do hereby certify that a certain horse (*describe him*) belonging to F H, of the county of            impressed by me for the purpose of conveying a convict from the jail of            to the penitentiary house in the city of Richmond, died while he was employed in the said service. Given, &c.

*(D) Certificate of the first valuers, where the property is supposed to have been injured.*

Whereas F H, of the county of            hath this day produced to us A B and C D, a certain horse (*describe him*) which was impressed by E S, sheriff of the said county, for the purpose of conveying a convict from the jail of            to the penitentiary house in the city of Richmond, and which horse was before valued by us to the sum of            and we having been again called on by the said F H, to certify the present value of the said horse, in consequence of the injury which he has sustained in the service of the commonwealth, as is alledged by the said F H; and being duly sworn for that purpose, are of opinion that his present value is only the sum of            Given under our hands this            day of            &c.

*(E) Warrant for a second valuation, where the first valuers are not to be found.*

to wit.

To J L and M O.

Whereas F H, of the said county, hath this day complained to me, J P, a justice of the peace for the county aforesaid, that a certain horse (*describe him*) impressed by E S, sheriff of the said county, for the purpose of conveying a convict from the jail of            to the penitentiary house in the city of Richmond, and formerly appraised by A B and C D, hath been injured in the service of the commonwealth, and that the said A B and C D cannot now be found, to re-value the said horse. These are, therefore, to require you, having been first duly sworn for that purpose, to value the said horse, and his present value to certify to me, under your hands. Given, &c.

*(F) Second valuation.*

We J L and M O have, in pursuance of a warrant to us directed by J P, a justice of the peace for the county of            after having been first duly sworn for that purpose, valued a certain horse (*describe him*) belonging to F H, of the said county, which was impressed by E S, sheriff of the said county, for the purpose of conveying a prisoner from the jail of            to the penitentiary, and are of opinion that his present value is            only. Given, &c.

*(G) Certificate of the justice.*

To the auditor of public accounts.

I do hereby certify that a certain horse (*describe him*) the property of F H, of the county of        was, on the        day of        pursuant to my warrant, to A B and C D directed, valued by them at the sum of        that the said horse was impressed by E S, sheriff of the said county, for the purpose, &c. and was in the service of the commonwealth        days, when he was restored to the said F H, and was on the        day of        appraised by        to the sum of        Given, &c.

☞ If the first and second valuations were made in pursuance of warrants from different justices, then a certificate of the first and second valuation must be obtained from each justice separately.

## INDICTMENT.

- I. Indictment, what. II. What offences are indictable. III. Within what time an indictment should be brought. IV. How far several offenders, or several offences, may be joined in one indictment. V. Whether the grand jury may examine witnesses against the commonwealth. VI. How many witnesses are requisite for an indictment. VII. Whether a grand jury may find an indictment specially. VIII. Form of an indictment.*

## I. INDICTMENT, WHAT.

INDICTMENT cometh from the *French* word *enditer*, and signifies in law, an accusation found by an inquest of twelve or more, upon their oath, and as the *appeal* is ever the suit of the party, so the indictment is always the suit of the commonwealth, and, as it were, its declaration; and the party who prosecutes it is a good witness to prove it. And when such accusation is found by a grand jury, without any bill brought before them, and afterwards reduced to a formed indictment, it is called a *presentment*; and when it is found by jurors returned to inquire of that particular offence only, which is indicted, it is properly called an *inquisition*. 1 *Inst.* 126. 2 *Haw.* 209.

## II. WHAT OFFENCES ARE INDICTABLE.

There can be no doubt, but that all capital crimes whatsoever, and also all kinds of inferior crimes of a public nature, as misprisions, contempts, disturbances of the peace, oppressions, and all other misdemeanors whatsoever, of a public evil example against the *common law*, may be indicted; but no injuries of a private nature, unless they somehow concern the commonwealth. 2 *Haw.* 210.

Also, it seems to be a good general ground, that wherever a *statute* prohibits a matter of a public grievance to the liberties and security of a citizen, or commands a matter of public convenience, as the repairing of the common streets of a town; an offender against such statute is punishable, not only at the suit of the party grieved, but also by way of indictment for his contempt of the statute, unless such method of proceeding do manifestly appear to be excluded by it. Yet if the party offending hath been fined to the commonwealth in the action brought by the party (as it is said that he may in every action for doing a thing prohibited by statute) it seems questionable, whether he may afterwards be indicted, because that would make him liable to a second fine for the same offence. 2 *Haw.* 210.

But if a statute extend only to *private* persons, or if it extend to all persons in general, but chiefly concern disputes of a private nature, as those relating to distresses made by lords on their tenants; it is said that offences against such statute will hardly bear an indictment. 2 *Haw.* 211.

Also, where a statute makes a new offence, and appoints a particular method of proceeding, without mentioning an indictment, it seemeth to be settled at this day, that it will not maintain an indictment. 2 *Haw.* 211. *Str.* 679.

But lord *Hale* distinguishes upon this, and says, that if a statute prohibit any act to be done, and by a substantive clause gives a recovery by action of debt, bill, plaint, or information, but mentions not an indictment; the party may be indicted upon the *prohibitory clause*, and thereupon fined, but not to recover the penalty; but then it seems the fine ought not to exceed the penalty; but if the act be not prohibitory, but only that if any person shall do such a thing, he shall forfeit so much, to be recovered by action of debt, bill, plaint, or information, then he cannot be indicted for it, but the proceeding must be by action, bill, plaint, or information. 2 *H. H.* 171.

Also, where a statute adds a further penalty to an offence, prohibited by the common law. There can be no doubt but that the offender may be still indicted, if the prosecutor thinks fit, at common law; and if the indictment for such offence conclude, *against the form of the statute*, and cannot be made good as an indictment upon the statute, it seems to be now settled, that it may be maintained as an indictment at common law. 2 *Haw.* 211.

A fact amounting to a felony is not indictable as a trespass. *I. Raym.* 712.

### III. WITHIN WHAT TIME AN INDICTMENT SHOULD BE BROUGHT.

‘ All actions, suits, bills, indictments, or informations, which shall be had, brought, sued, or exhibited upon any penal law, where the punishment to be inflicted upon the offender, on conviction, shall neither be death nor imprisonment in the jail and penitentiary house, shall be had, brought, sued, exhibited, or moved, within *one year* next after the offence committed, and not after; except where a longer or shorter time for the commencement of such suit, or prosecution, is or shall be fixed by law.’ 2 *Rev. Code*, p. 80, sect. 2.

‘ Every indictment or information for perjury, subornation of perjury, or such forgeries or publications thereof, as may not be punishable by death, or imprisonment in the jail or penitentiary house, shall be exhibited or moved within *three years* next after the time of committing the offence, and not after. *Ibid.* sect. 3.

### IV. HOW FAR SEVERAL OFFENDERS MAY BE JOINED IN ONE INDICTMENT.

1. If there be *one offender*, and *several offences* committed by him, as burglary and larceny, they may be contained in one indictment. 2 *H. H.* 173.

In the case of *K. and Clendon*, there was an indictment setting forth that the defendant made an assault upon *Sarah Beatniff* and *Elizabeth Cooper*; and did them beat, wound, and evil intreat. After verdict it was moved, in arrest of judgment, that these were two distinct offences, and therefore could not be laid in the same indictment; and of that opinion was the court, and the judgment was arrested. *Sira.* 870.

But this case has since been denied to be law. See 2 *Burr.* 984.

2. If there be *several offenders* that commit the same offence, though in law they are several offences, in relation to the several offenders, yet they may be joined in one indictment; as if several commit a robbery, or burglary, or murder. 2 *H. H.* 173.

3. And so it is, though the offences are of *several degrees*, but dependent one upon another, as the principal in the first degree, and the principal in the second degree, to wit, present, aiding and abetting the principal, and accessory before or after. 2 *H. H.* 173.

4. Also several persons may be indicted in the same indictment for *several offences of the same nature*, as for keeping disorderly houses; but the indictment ought to set forth that they severally did so. 2 *H. H.* 173.

And this is only to be understood where the offences may be joint, as in extortion, maintenance, receiving stolen goods, and the like; and not where the offence is a separate act in each, as in the case of *K.* against *Philips* and others. Six were indicted in one indictment for *perjury*; and four of them pleading, were convicted, it was moved, in arrest of judgment, that the crime of perjury is, in its nature, several, and two cannot be indicted together. And by the court, there may be great inconveniencies if this is allowed; one may be desirous to have *certiorari*, and the other not; the jury on the trial of all may

apply evidence to all that is but evidence against one. And they cited a case, *T. 6 An. Q.* against *Hodgson* and others, where two were indicted for being scolds, and compared to barratry, and it was held not to lie. And in the principal case judgment was arrested. *Str.* 921.

In like manner, *K.* against *Weston* and others. There was an indictment against six jointly and severally for exercising a trade; and quashed, because there ought to be distinct indictments. *Str.* 623. See 4 *Burr.* 2046. *S. P.*

But an indictment will lie against several for publicly singing, in the street, libellous songs, reflecting on the prosecutor's son and daughter. 2 *Burr.* 980.

5. Larcenies committed of several things, though at several times, and from several persons, may be joined in one indictment. 2 *H. H.* 173.

## V. WHETHER THE GRAND JURY MAY EXAMINE WITNESSES AGAINST THE COMMONWEALTH.

Lord *Hale* says that the grand jury ought only to hear the evidence for the commonwealth, and in case there be *probable* evidence, they ought to find the bill, because it is but an accusation, and the party is to be put on his trial afterwards. 2 *H. H.* 157.

Which doctrine is also laid down by chief justice *Pemberton*, in the case of the earl of *Shaftsbury*. *St. Tr.* vol. 3, p. 415.

But the learned editor of *Hale's History*, observes upon this, that sir *John Hawles*, in his remarks upon the said case (*St. Tr.* vol. 4, p. 183) unanswerably shews, that a grand jury ought to have the same persuasion of the truth of the indictment as a petty jury, or a coroner's inquest; for they are sworn to present the truth, and nothing but the truth. See 2 *Hale*, 157, note (a.)

And lord *Coke* says, that seeing indictments are the foundation of all, and are commonly found in the absence of the party accused, it is necessary there should be substantial proof. 3 *Inst.* 25.

## VI. HOW MANY WITNESSES ARE REQUISITE TO AN INDICTMENT.

An indictment may be found upon the oath of one witness only, unless it be for high treason, which requires two witnesses. (2 *Haw.* 256.) And unless in any instance it be otherwise specially directed by act of Assembly. See 'TREASON.'

## VII. WHETHER THE GRAND JURY MAY FIND AN INDICTMENT SPECIALLY.

It seems to be generally agreed, that the grand jury may not find part of an indictment to be true, and part false; but must either find a true bill, or *ignoramus* for the whole; and that if they take upon them to find it specially, or conditionally, or to be true for part only, and not for the rest, the whole is void, and the party cannot be tried upon it, but ought to be indicted anew. 2 *Haw.* 210.



## VIII. FORM OF AN INDICTMENT.

In order to understand this matter rightly, it is judged requisite, first, to insert the entire form of an indictment, and then to take it in pieces, and explain the several parts of it in their order.

The instance which is chosen is on the statute of stabbing. 1 Jac. c. 8.

The *caption* of the indictment is no part of the indictment itself, but is the style or preamble, or return that is made from an inferior court to a superior, from whence a certiorari issues to remove; or when the whole record is made up in form. 2 H. H. 166.

**NOTE.** The following indictment is founded on a statute which is not in force in this country. It will, however, equally elucidate the doctrine of indictments, and is given merely for example. It is humbly submitted whether the words included thus [ ] may not now be omitted, on the authority of the laws adduced in support of that opinion. But I give it merely as an opinion, and would by no means wish the profession to depart from precedents long settled and grown venerable by antiquity, without some further and better warrant for such departure.

*The caption of an indictment runs thus :*

county, to wit.

The jurors for the commonwealth, for the body of the county of upon their oath, do present, That *John Armstrong* late of *Appleby*, in the county aforesaid, yeoman, [not having God before his eyes, but being moved and seduced by the instigation of the devil] on the thirtieth day of March, in the year of our Lord at the hour of nine in the afternoon of the same day [with force and arms] at *Appleby* aforesaid, in the county aforesaid, and within the jurisdiction of the district court aforesaid, in and upon one *George Harrison* [in the peace of God and of the said commonwealth] then and there being (the aforesaid *George Harrison* not having any weapon then drawn, nor the aforesaid *George Harrison* having first stricken the said *John Armstrong*) feloniously did make an assault, and that the aforesaid *John Armstrong*, with a certain drawn sword [of the value of five shillings] which he the said *John Armstrong* in his right hand then and there had and held, the said *George Harrison* in and upon the right side of the belly, near the short ribs of him the said *George Harrison* (the aforesaid *George Harrison*, as is aforesaid, then and there not having any weapon drawn, nor the aforesaid *George Harrison* then and there having first stricken the said *John Armstrong*) then and there feloniously did stab and thrust, giving unto the said *George Harrison* then and there, with the sword aforesaid, in form aforesaid, in and upon the right side of the belly, near the short ribs of him the said *George Harrison*, one mortal wound of the breadth of one inch, and of the depth of nine inches; of which said mortal wound, he the said *George Harrison* then and there instantly died, and so the jurors aforesaid, upon their oath aforesaid, do say, that the said *John Armstrong* him the said *George Harrison*, on the aforesaid thirtieth day of March, in the year aforesaid, at *Appleby* aforesaid, in the county aforesaid, in manner and

form aforesaid, feloniously did kill ; against the peace and dignity of the commonwealth, and against the form of the statute in such case made and provided.

*The following are the substantial parts of the body of an indictment.*

That late of [in the county aforesaid, yeoman.]  
The name of the party indicted regularly ought to be inserted, and inserted truly in every indictment. 2 H. H. 175.

But the inhabitants of a parish may be indicted for not repairing the highway, although no person is particularly named. Wood, b. 4. c. 5.

It is said that no person indicted can take advantage of a mistaken surname in the indictment, notwithstanding such surname has no manner of affinity with its true one, and he was never known by it. 2 Haw. 230; 1, 2, 3. 2 H. H. 176.

But the mistake of the christian name is pleadable, and the party shall be dismissed from that indictment. Ibid.

But the safest way is to allow his plea of *misnomer*, both as to his surname and as to his christian name, for he that pleads *misnomer* of either must in the same plea set forth what his true name is, and then he concludes himself, and if the grand jury be not discharged, the indictment may presently be amended by the grand jury, and returned according to the name he gives himself. Ibid.

Also, an indictment naming the defendant by two christian names is not good. L. Raym. 562.

If the county is in the margin, and the indictment sets forth the fact to be done at such a place, *in the county aforesaid*, it is good, for it refers to the county in the margin ; but if there be two counties named, one in the margin, and another in the addition of any party, or in the recital of an act of parliament, the fact laid at such a place in the county aforesaid vitiates the indictment, because two counties are named before, and therefore it is uncertain to which it refers. Crown Cir. 115, 116.

But although the defendant be indicted by a wrong name or addition, or with no addition, yet if he appear, and plead not guilty, without taking advantage of that defect, he shall never alledge the *misnomer*, or want of addition, to stop his trial or judgment ; for by such his appearance, and pleading to issue, the indictment is affirmed, and the *misnomer* or want of addition salved. 2 H. H. 176.

And if several persons be indicted for one offence, *misnomer*, or want of addition of one, quashed the indictment only against him, and the rest shall be put to answer ; for they are, in law, as several indictments. Ibid. 177.

*Not having God before his eyes, but being moved and seduced by the instigation of the devil.....*I do not find it asserted by any authority, that these words are necessary in an indictment. *On the thirtieth day of March, in the year of.....*No indictment can be good, without precisely shewing a certain day of the material facts alledged in it. 2 Haw.

And if the offence be done in the night, before midnight, the indictment shall suppose it to be done in the day before; and if it happen after midnight, then it must say it was done that day after. *Lamb.* 492.

And although the day be inserted, yet if the year is not inserted, the indictment is insufficient. *2 H. H.* 177.

But where an indictment charges a man with a bare omission, as the not scouring such a ditch, it is said that it needs not shew any time. *2 Haw.* 236.

And if it say, on such a day last past, without shewing in what year, that is good enough; for the certainty may be found out by the stile of the session. *Lamb.* 491.

But though the day of the year be mistaken in the indictment, yet if the offence were committed in the same county, though at another time, the offender ought to be found guilty: but then it may be requisite, if any escheat or forfeiture of land be conceived in the case, for the petit jury to find the true time of the offence committed; and therefore it is best in the indictment to set down the time as truly as can be, though it be not of absolute necessity to the defendant's conviction. *2 H. H.* 179.

And this the rather, because the jury are to find the indictment upon their oaths. *Dalt. c.* 184.

Upon which ground, namely, because the jury are sworn to present the truth, it is best to lay all the facts in the indictment as near to the truth as may be.

*At the hour of nine in the afternoon of the same day.....* It is not necessary to mention the *hour* in an indictment, except for burglary. *2 Haw.* 235.

*With force and arms.....* These words are not now necessary. *1 Rev. Code*, p. 105, sect. 22.

But yet, where such words are proper and pertinent, it is safe and advisable to insert them, if it be to no other purpose than to aggravate the offence. *2 Haw.* 242.

*At Ashfleby aforesaid, in the county aforesaid.....* No indictment can be good, without expressly shewing some *place* wherein the offence was committed, which must appear to have been within the jurisdiction of the court. *Ibid.* 236.

But a mistake in the place will not be material upon the evidence, on not guilty pleaded, if the fact be proved at some other place in the same county. *Ibid.* 237.

And it is not sufficient that the county be expressed in the margin, but the vill where the offence was committed must be alledged to be in the county named in the margin, or, *in the county aforesaid*, which seems to be sufficient where but one county is named before, but to be uncertain where a county is named in the body of the indictment, different from that in the margin. (*Ibid.* 220. *2 H. H.* 180.) But the vill, parish, &c. need not now be named. *1 Rev. Code*, p. 105, sect. 23.

*In and upon one George Harrison.....* Wherever the person injured be known to the jurors, his name ought to be put in the indictment. *2 Haw.* 232.



But if they know not his name, an indictment for the murder of a person unknown, or for stealing the goods of a person unknown, is good. 2 H. H. 181.

Also, there is no need of an addition of the person upon whom the offence is committed, unless there be a plurality of persons of the same name; neither is it essential to the indictment, though sometimes it may be convenient for distinction sake to add it. *Ibid.* 182.

*In the peace of God, and of the commonwealth, then and there being...* It is usual to alledge this, but not necessary, and possibly not true, for he might be breaking the peace at the time. *Ibid.* 186.

*The aforesaid George Harrison not having any weapon then drawn, nor the aforesaid George Harrison having first stricken the said John Armstrong....* An indictment, grounded upon an offence made by statute, must by express words bring the offence within the substantial description made in the statute; and those circumstances mentioned in the statute to make up the offence shall not be supplied by the general conclusion, *against the form of the statute.* *Ibid.* 170.

And so it is, if a statute oust clergy in certain cases, as murder of malice forethought, robbery in or near the highway, though the offences themselves were at common law, yet because at common law within clergy, they shall not be ousted of clergy, though convicted, unless the circumstances, as of malice forethought, or near the highway, be expressed in the indictment. *Ibid.* 170.

But there is no necessity in an indictment on a public statute, to recite such statute; for the judges are bound, *ex officio*, to take notice of all public statutes. 2 Haw. 245.

Yet if the prosecutor take upon him to recite it, and materially vary from a substantial part of the purview of the statute, and conclude, *against the form of the statute aforesaid*, he vitiates the indictment. *Ibid.* 246.

So, the misrecital of the title of a statute is fatal. *Ibid.* 247.

*Feloniously did make an assault....* There are several words of art which the law hath appropriated for the description of the offence, which no circumlocution will supply; as *feloniously*, in the indictment of any felony; *burglariously*, in an indictment of burglary; and the like. 2 H. H. 184.

And if a man be indicted that he *stole*, and it is not said *feloniously*, this indictment imports but a trespass. *Ibid.* 172.

*With a certain drawn sword....* Yet if the party were killed with another weapon, it maintains the indictment; but if it were with another kind of death, as poisoning, or strangling, it doth not maintain the indictment upon evidence. *Ibid.* 185.

*Of the value of five shillings....* It was formerly necessary to set forth the value of the instrument, because it was forfeited as a *deodand*. (*Ibid.*) But it is now grown obsolete. See DEODAND.

*Which he the said John Armstrong in his right hand then and there had and held....* It must shew in what hand he held his sword. *Ibid.*

*In and upon the right side of the belly, near the short ribs of the said George Harrison....* There must be a certainty of the offence committed, and nothing material shall be taken by intentment or implication; but the special manner of the whole fact ought to be set forth with certainty. 2 Haw. 225, 227.

And therefore in the case of murder, it ought to shew in what part of the body the person was wounded: and therefore if it be on his arm, or hand, or side, without saying whether right or left, it is not good. 2 H. H. 185.

If theft be alledged in any thing, the indictment must set forth the value of the thing stolen; that it may appear whether it be grand or petit larceny. *Ibid.* 183.

In like manner, an indictment that the defendant took and carried away such a person's goods and chattels, without shewing what is certain, as one horse, one cow, is not good. *Ibid.* 182.

An indictment that the defendant is a common highwayman, a common defamer, a common disturber of the peace, and the like, is not good; because it is too general, and contains not the particular matter wherein the offence was committed. *Ibid.*

In like manner, an indictment for divers scandalous threatnings, and contemptuous words, spoken of a justice of the peace, is not good, but ought to set forth the words in special. *Str.* 699.

An indictment for disobeying an order of justices must find, positively, that such an order was made, and not by way of recital, *that whereas* —. *L. Faym.* 1363.

*Then and there feloniously did stab and thrust....* In an indictment it is best, and often necessary, to repeat the time and place, to the several parts of the fact. 2 H. H. 178.

Thus, in an indictment of murder or manslaughter, as well the day and place of the stroke, or other act done, as of the death, must be expressed; the former, because the escheat or forfeiture of lands relates thereto; the latter, because it must appear that the death was within the year and day after the stroke. *Ibid.* 179.

*One mortal wound, of the breadth of one inch, and of the depth of nine inches....* Regularly the length and depth of the wound is to be shewed; but this is not necessary in all cases, as namely, where a limb is cut off; so it may be also a dry blow. *Ibid.* 186.

But though the manner and place of the hurt, and its nature, be requisite as to the formality of the indictment, and it is fit to be done as near the truth as may be, yet if upon evidence it appear to be another kind of wound, in another place, if the party died of it, it is sufficient to maintain the indictment. *Ibid.*

*Against the peace, &c....* The conclusion of all indictments in this commonwealth is, *against the peace and dignity of the commonwealth.* *Const. Virg.* art. 18.

*And against the form of the statute in such case made and provided....* Regularly, if a statute only make an offence, or alter an offence from one crime to another, as making a bare misdemeanor to become a felony, the indictment for such new made offence at common law must conclude, against the form of the statute, or otherwise it is insufficient. 2 H. H. 192.

But if a man be indicted for an offence, which was at common law, and concludes, against the form of the statute, but in truth it is not brought by the indictment within the statute, it shall be quashed, and the party shall not be put to answer if as an offence at common law. *Ibid.* 171.

And if an offence were felony at common law, but a special act of Assembly oust the offender of some benefit that the common law allowed him, when certain circumstances are in the fact; though the body of such indictment must express those circumstances, according as they are prescribed in the statute, yet the indictment need not conclude, against the form of the statute. Thus on the statute of the 8 *El.* c. 4. in case of pick-pockets, the body of the indictment must bring them within the express purview of the statute, or otherwise they shall have the benefit of clergy; but it need not conclude, against the form of the statute, neither is it usual in such cases, for it was felony before, and the statute doth not give a new punishment, nor make it to be a crime of another nature, but only takes away clergy. But yet, if it should conclude in such case, against the form of the statute, it would not vitiate the indictment, but would be only surplusage. 2 *H. H.* 190.

If an act of Assembly making an offence be but temporary, and made perpetual by another statute, the indictment concluding against the form of the statute is good. *Ibid.* 173.

If the former statute be discontinued, and revived by another statute, the best way is to conclude, against the form of the statutes; though there is a good opinion, that it is good enough to conclude against the form of the first statute. *Ibid.*

If one statute be relative to another, as where the former makes the offence, the latter adds a penalty; the indictment ought to conclude, against the form of the statutes. *Ibid.*

### *Condition of a recognizance to prefer a bill of indictment.*

(The penalty may be the same as form (A) under title RECOGNIZANCE.

The condition of this recognizance is such, that if the above bound A J shall personally appear at the next court to be holden at for &c. and then and there prefer a bill of indictment against A O, late of yeoman, for the felonious taking and carrying away of the property of and shall then and there give evidence concerning the same, to the jurors who shall inquire thereof, on the part of the commonwealth. And in case the same be found a true bill, then, if the said A J shall personally appear before the jurors, who shall pass upon the trial of the said A O, and give evidence upon the same indictment, and not depart without leave of the court, then this recognizance to be void.

### *Condition of a recognizance to answer to an indictment.*

(For the penalty, see form (A) title RECOGNIZANCE.

The condition of this recognizance is such, that if the above bound A O shall personally appear at the next court, to be holden at for &c. then and there to answer to an indictment to be preferred against him, by A J, of yeoman, for assaulting and beating him the said A J, and not to depart without leave of the court, then this recognizance to be void.

## INFANTS.

1. BY an infant, or minor, is meant any one who is, under the age of twenty-one years. 1 *Inst.* 2.

2. It is said, generally, that those who are under a natural disability of distinguishing between good and evil, as infants under the age of fourteen years, which is called the age of discretion, are not punishable by any criminal prosecution whatsoever. But this must be understood with some allowance; for if it appear by the circumstances, that an infant under the age of discretion could distinguish between good and evil, as if one of the age of nine or ten years kill another, and hide the body, or make excuses, or hide himself, he may be convicted and condemned, and forfeit as much as if he were of full age, but in such case the judges will in prudence respite the execution, in order to get a pardon: and it is said, that if an infant, apparently wanting discretion, be indicted and found guilty of felony, the justices themselves may dismiss him without a pardon. And in general it must be left to the discretion of the judge, upon the circumstance of the case, how far an infant, under that age, is *capax doli*, or hath knowledge to discern betwixt good and evil. *Hale's Pl.* 43. 1 *Haw.* 2. 1 *H. H.* 18.

A remarkable instance of this kind we have in the case of William York, who, a boy of ten years of age, was convicted before lord chief justice Willes for the murder of a girl of about five years of age; and received sentence of death. But the chief justice, out of regard to the tender years of the prisoner, respited execution, till he should have an opportunity of taking the opinion of the rest of the judges, whether it was proper to execute him or not, upon the special circumstance of the case; which he reported to the judges as follows. The boy and girl were parish children, but under the care of a parishoner, at whose house they were lodged and maintained. On the day the murder happened, the man of the house and his wife went out to their work early in the morning, and left the children in bed together. When they returned from work the girl was missing; and the boy being asked what was become of her, answered, that he had helped her up, and put on her clothes, and that she was gone he knew not whither. Upon this, strict search was made in the ditches and pools of water near the house, from an apprehension that the child might have fallen into the water. During this search, the man under whose care the children were observed that a heap of dung near the house had been newly turned up. And upon removing the upper part of the heap, he found the body of the child, about a foot's depth under the surface,



cut and mangled in a most barbarous and horrid manner. Upon this discovery, the boy, who was the only person capable of committing the fact, that was left at home with the child, was charged with the fact, which he stiffly denied. When the coroner's jury met, the boy was again charged, but persisted still to deny the fact. At length, being closely interrogated, he fell to crying, and said he would tell the whole truth. He then said, that the child had been used to foul herself in bed; that she did so that morning (which was not true, for the bed was searched and found to be clean) that thereupon he took her out of the bed, and carried her to the dung heap; and with a large knife, which he found about the house, cut her in the manner the body appeared to be mangled, and buried her in the dung heap; placing the dung and straw that was bloody under the body, and covering it up with what was clean; and having so done, he got water and washed himself as clean as he could. The boy was the next morning carried before a neighbouring justice, before whom he repeated his confession, with all the circumstances he had related to the coroner and his jury. The justice very prudently deferred proceeding to a commitment, till the boy should have an opportunity of recollecting himself. Accordingly he warned him of the danger he was in, if he should be thought guilty of the fact he stood charged with, and admonished him not to wrong himself; and then ordered him into a room where none of the crowd that attended should have access to him. When the boy had been some hours in this room, where victuals and drink were provided for him, he was brought a second time before the justice, and then repeated his former confession. Upon which he was committed to jail. On the trial evidence was given of the declarations before mentioned to have been made before the coroner and his jury, and before the justice; and of many declarations to the same purpose, which the boy made to other people after he came to jail, and even down to the day of his trial. For he constantly told the same story in substance, commonly adding, that the devil put him upon committing the fact. Upon this evidence, with some other circumstances tending to corroborate the confession, he was convicted. Upon this report of the chief justice, the judges having taken time to consider of it, unanimously agreed, 1. That the declarations stated in the report were evidence proper to be left to the jury. 2. That supposing the boy to be guilty of this fact, there are so many circumstances stated in the report, which are undoubtedly tokens of what lord chief justice Hale somewhere calleth *mischievous discretion*, that he is certainly a proper object for capital punishment, and ought to suffer. For it would be of very dangerous consequence to have it thought that children may commit such atrocious crimes with impunity.

There are many crimes of the most heinous nature, such as in the present case, the murder of young children, poisoning parents or masters, burning houses, and the like. which children are very capable of committing, and which they may in some circumstances be under strong temptations to commit; and therefore, though the taking away the life of a boy of ten years old may savour of cruelty, yet as the example of this boy's punishment may be the means of deterring other children from the like offences, and as the sparing this boy merely on account of his age will probably have a quite contrary

tendency ; in justice to the public, the law ought to take its course, unless there remaineth any doubt touching his guilt. In this general principle all the judges concurred. But two or three of them, out of great tenderness and caution, advised the chief justice to send another reprieve for the prisoner ; suggesting that it might possibly appear on further inquiry, that the boy had taken this matter upon himself, at the instigation of some other person, who hoped by the artifice to screen the real offender from justice. Accordingly, the chief justice did grant one or two more reprieves ; and desired the justice who took the boy's examination, and also some other persons in whose prudence he could confide, to make the strictest inquiry they could into the affair, and make report to him. At length he, receiving no further light, determined to send no more reprieves, and to leave the prisoner to the justice of the law, at the expiration of the last. But before the expiration of that reprieve, execution was respited till further order, by warrant from one of the secretaries of state. And at the summer assizes, 1757, he had the benefit of his majesty's pardon, upon condition of his entering immediately into the sea service. *Fost.* 70.

3. But within seven years of age there can be no guilt whatsoever of any capital offence ; the infant may be chastised by his parents or tutors, but cannot be capitally punished, because he cannot be guilty ; and if he be indicted for such an offence as is in its nature capital, he must be acquitted. 1 *H. H.* 19, 20.

4. An infant under fourteen is presumed by law unable to commit a rape, and therefore it seems cannot be guilty of it ; and though in other *felonies malitia supplet aetatem* in some cases, yet it seems as to this fact the law presumes him impotent, as well as wanting discretion. 1 *H. H.* 630.

5. An infant may be guilty of forcible entry, in respect of personal actual violence. (1 *Haw.* 147.) And the justices may fine him therefor. But yet it shall be good discretion in the justices of the peace to forbear the imprisonment of such infant. *Dalt.* c. 126.

Because it is said, that he shall not be subject to corporal punishment, by force of the general words of any statute wherein he is not expressly named. 1 *Haw.* 147.

6. But if one who wants discretion commit a trespass, against the person or possession of another, he shall nevertheless be compelled in a civil action to give satisfaction for the damages. 1 *Haw.* 2. 1 *H. H.* 15, 16.

7. An infant may bring an appeal, although it take from the defendant the benefit of waging battle ; but he must prosecute such appeal by a guardian. 2 *Haw.* 161, 162.

An appeal likewise may be brought against him. 2 *Haw.* 168.

8. An infant under the age of discretion cannot be an approver ; because he cannot take the oath requisite in that case. 2 *Haw.* 205.

9. In case of a rape committed upon a child of twelve years old, such child may be sworn as evidence ; yea, if she be under that age, if it appear to the court that she knows and considers the obligation of an oath, she may be sworn. And in case of evidence against witches, an infant of nine years old was sworn. 1 *H. H.* 634. *Dalt.* 378.

10. An infant before twenty-one years of age shall not be sworn in an inquest. 1 *Inst.* 78. 1 *Rev. Code*, p. 101, sect. 12.

11. A woman at nine years of age may have dower; at twelve may consent to marriage; and at fourteen is of age of discretion, and may choose a guardian. 1 *Inst.* 78.

12. A man is of age at twelve years to take the oath of allegiance; and at fourteen is of age of discretion, may consent to marriage, and choose his guardian. 1 *Inst.* 171.

13. At twenty-one, and not before, persons may bind themselves by any deed, and alien lands, goods and chattels. 1 *Inst.* 171.

'No person under eighteen years shall be capable of disposing of his chattels by will.' 1 *Rev. Code*, p. 161, sect. 4.

14. Infants may not enter into recognizance to keep the peace, or to be of good behaviour, but their sureties only.

15. But an infant may bind himself to pay for his necessary meat, drink, apparel, physic, and such like; and also for his good teaching or instruction, whereby he may profit himself afterwards; but if he binds himself in an obligation or other writing, with a penalty for the payment of any of these, that obligation shall not bind him. 1 *Inst.* 172.

And in Earl's case, 1 *Salk.* 387, it is said, that an infant may buy necessities, but cannot borrow money to buy; for he may misapply the money, and therefore the law will not trust him, but at the peril of the lender, who must lay it out for him, or see it laid out. See further on this subject, *Fonblanque*, B. 1. ch. 2, sect. 4, and notes.

16. Also, an infant hath, without consent of any other, capacity to purchase, for it is intended for his benefit; and at his full age, he may either agree thereto, and perfect it, or, without any cause to be alledged, wave, or disagree to the purchase; and so may his heirs after him, if he agree not thereunto after his full age. 1 *Inst.* 2.

17. The common law seems not to have determined precisely at what age one may make a testament of a personal estate; it is generally allowed that it may be made at the age of eighteen, and some say under. 1 *Inst.* 89. 1 *H. H.* 17.

18. A person is of age to be an executor at seventeen; and an administrator of any one during the minority of an infant ceaseth when the infant comes to that age. 5 *Co. Pigot's case.* 1 *H. H.* 17.

19. An infant cannot answer but by guardian; but he may sue either by his next friend or by guardian. 3 *Salk.* 196.

20. If an infant of the age of seventeen years release a debt, this is void; but if an infant make the debtor his executor, this is a good release in law of the action. 1 *Inst.* 264.

21. But now 'the appointment of a debtor an executor shall in no case be an extinguishment of the debt, unless it be so directed in the will' 1 *Rev. Code*, p. 166, sect. 50.

22. The guardianship of an infant may be devised, or transferred by deed, by his father. See 1 *Rev. Code*, p. 172, sect. 1.

23. Infants seized of estates in trust, or by way of mortgage, may make conveyances thereof, as the high court of chancery shall direct. 1 *Rev. Code*, p. 173, sect. 13.

24. And they may surrender leases by order of such court, in order to renew the same. 1 *Rev. Code*, p. 173, sect. 14.

25. Debts due infants from their guardians are to be paid by the



executors, &c. of such guardian, in preference to all others. 1 *Rev. Code*, 167.

☞ The legal capacity of infants to commit crimes, when of certain ages, is thus summarily exhibited in a note to 1 *Haw.* (7th edit. by *Leach*) p. 1. On the attainment of fourteen years of age, the criminal actions of infants are subject to the same modes of construction as those of the rest of society; for the law presumes the human mind has acquired, at this period, a complete sense of right and wrong. (*Dr. & St. c. 26. Co. Lit. 79, 171, 247.*) During the interval between the age of fourteen years and that of seven, the mind is *prima facie* presumed to be unacquainted with guilt. And these presumptions entertained in favour of innocence accumulate in an inverse proportion with the decrease and tenderness of the offender's years. (1 *Hale* 25, 27.) From this supposed imbecility of mind, the protective humanity of the law will not, without anxious circumspection, permit an infant to be convicted on his own confession. (*Cro. Jac. 466. 1 Hale 24. Post. 70.*) Yet, if it appear by strong and pregnant evidence and circumstances, that he was perfectly conscious of the nature and malignity of the crime, the verdict of a jury may find him guilty, and judgment of death may be given against him. (1 *Hale* 20, 25, 454. *Cro. Car. 133. 4 Bl. Com. 23. Post. 71.* For *malitia supplet aetatem*, and the capacity of contracting guilt, is measured more by the apparent strength of the offender's understanding than by years and days. (*Bro. Cor. 47. 4 Bl. Com. 23.*) But within the age of seven years an infant cannot be punished for any capital offence, whatever circumstances of a mischievous discretion may appear; for *ex presumptione juris* he cannot have discretion; and against this presumption no averment shall be admitted. (*Mirr. c. 4, sect. 16. Plowd. 19. 1 Hale 20. Post. 349. 4 Bl. Com. 23. Cowp. 222, 223.*) Therefore, if a child under this age steal the goods or fire the house of another, he cannot be punished for either the larceny or the arson. 1 *Hale* 19, 514. *Post. 113, 349.*

☞ For more concerning *infants*, see titles 'APPRENTICES EVIDENCE.'

## INFORMATION.

### I. OF INFORMATION IN GENERAL.

INFORMATIONS are of two kinds. First, such as are merely at the suit of the commonwealth; and secondly, such as are partly the suit of the commonwealth and partly the suit of the party, which are commonly called informations *qui tam*, from these words in the information, when the proceedings were in Latin, *qui tam pro Domino Rege quam pro se ipso.* 2 *Haw.* 259.



2. Of near affinity to an information *qui tam* is an action upon a statute; which is either a *private* action, that is, when an action is given upon a statute to the commonwealth, and to the *party grieved* only; or a *popular* action, that is, when the action is given to the commonwealth, or to any one who will sue for the commonwealth and himself. *Wood. B. 4. ch. 4.*

3. But if the commonwealth commenceth suit before the informer, the commonwealth shall have the whole forfeiture, because in such case it also is the informer; and it may, before the informer begins his suit, release the penalty to the offender, and bar all others. But if, after a popular action is brought by the informer, the commonwealth's attorney will enter *ulterius non vult prosecui*, the informer may prosecute for his part. *Ibid.*

4. Where a matter concerns the public government, and no particular person is entitled to an action, there an information will lie. 1 *Salk. 374. Case of the SURGEON'S COMPANY.*

5. An information lies, at the *common law*, for a variety of crimes less than capital, Batteries, Cheats, Perjuries, Riots, Extortions, Nuisances, Contempts, and such like; and also it lies in very many cases by statute, wherein the offender is liable to a fine, or other penalty. 2 *Hawk. 260.*

6. And in general it seems, that of common right an information at the suit of the commonwealth, or an action in the nature thereof, may be brought for offences against statutes, whether they be mentioned by such statutes or not, unless other methods of proceeding be particularly appointed, by which all others are impliedly excluded. *Ibid.*

7. But an information or action *qui tam* will not lie on any statute, which prohibits a thing as being an immediate offence against the public good in general, under a certain penalty, unless the whole, or part of such penalty, be expressly given to him who will sue for it; because otherwise it goes to the commonwealth, and nothing can be demanded by the party. But where such statute gives any part of such penalty to him who will sue for it by action or information, any one may bring such action or information, and lay his demand, as well for the commonwealth as for himself. 2 *Hawk. 256.*

8. Also, where a statute prohibits or commands a thing, the doing or omission whereof is an immediate danger to the party, and also highly concerns the peace, safety, or good government of the public, it seems to be the general opinion that the party grieved may bring his action *qui tam* on such statute. 2 *Hawk. 265.*

9. If an offence prohibited by a penal statute be also an offence at common law, the prosecution of it as an offence at common law is no way restrained hereby. 2 *Hawk. 272.*

10. If two informations be exhibited on the same day, for the same offence, they mutually abate one another. 2 *Hawk. 275.*

11. Actions popular, prosecuted by collusion, shall be no bar to those that are prosecuted with good faith. 1 *Rev. Code, p. 32. sect. 1.*

And compounding such actions, or dismissing them without leave of the court, where the whole penalty is not to the use of the informer, subjects the prosecutor to half the penalty to which the defendant was liable. *Ibid. sect. 2.*

12. The court will not generally quash an information upon motion ; but the party must either plead, demur, or move in arrest of judgment. 1 *Salk.* 372. *Str.* 185.

13. And seeing that an information differs from an indictment in little more than this, that the one is found by the oath of twelve men, and the other is not so found, but is only the allegation of the person who exhibits it, whatsoever certainty is required in an indictment, the same at least is necessary also in an information ; and consequently, as all the material parts of the crime must be precisely found in the one, so must they be precisely alleged in the other, and not by way of argument or recital. 2 *Hawk.* 260, 1.

14. For this reason, the statutes of Jeofails (from *Jay faille*, I have failed) or the statutes that do remedy oversights in pleading, extend not to informations. *Wood, B. 4. ch. 4.* But this is now altered in *Virginia*. See 2 *Rev. Code*, p. 38, sect. 6.

15. If an information contain several offences against a statute, and be well laid as to some of them, but defective as to the rest, the informer may have judgment for so much as is well laid. 2 *Hawk.* 266.

## II. HOW AND IN WHAT CASES AN INFORMATION MAY BE FILED, AND WHEN NOT.

1. It is the general practice not to grant leave to file an information, without first making a *rule* upon the person complained of, to shew cause to the contrary ; which rule is never granted, but upon motion made in open court, and grounded upon *affidavit* of some misdemeanor, which, if true, doth, either for its enormity or dangerous tendency, or other such like circumstances, seem proper for the most public prosecution. And if the person upon whom such rule is made, having been personally served with it, do not, at the day given him for that purpose, give the court good satisfaction, by *affidavit*, that there is no reasonable cause for the prosecution, the court generally grants the information ; and sometimes, upon special circumstances, will grant it against those who cannot be personally served with such rule, as, if they purposely absent themselves, &c. *Haw. B. 2. ch. 26, sect. 7. Bull. N. P. 210. 2 Str. 1044. Cases temp. Hard. 271.* [See post. *No. 5, as to filing informations in Virginia.*]

2. But if the party on whom such rule is made shew to the court a reasonable cause against such prosecution ; as that he has been before indicted for the same cause and acquitted ; or that the intent of the prosecution is to try a civil right, as the title to land, &c. which is not yet determined ; or that the complaint is trifling, vexatious, or oppressive, the court will not grant the information, unless there be some particular and extraordinary circumstances in the case, the determination whereof being wholly left to the discretion of the court, cannot well come under any certain stated rules. *Haw. B. 2 c. 26, sect. 8. Cro. Jac. 212. 4 Burr. 1963, 2024. Cases temp. Hard. 241.*

*Informations have been denied in the courts in England in the following cases :*

3. The court will not grant an information against a *private* person

for reading a *pretended* proclamation. (1 *Bl. Rep.* 2.) Nor against a husband for endeavouring to *retake* his wife contrary to articles of separation. (1 *Bl. Rep.* 18.) Nor against persons who assemble with a lawful design, notwithstanding some unlawful and irregular acts ensue. (1 *Bl. Rep.* 48.) Nor against justices acting improperly in their public capacity, unless flagrant proof of corruption appears. (2 *Str.* 1181. *Burr.* 785, 1162. *Bl. Rep.* 432. *Doug.* 589. 1 *Term. Rep.* 653.) Nor against ministers for converting brief money. (*St. Tr.* 113. *Bl. Rep.* 443.) Nor for bribing electors. (*Bl. Rep.* 541.) Nor for a perjured intrusion to a living upon an affidavit that it was simoniacal. (*Str.* 70.) Nor for a libel, if it appear to be true. (*Str.* 498. (*Doug.* 284, 387. 3 *Bac. Abr.* 475.) Nor for offences committed upon the high seas. (2 *Str.* 918.) Nor against a dissenter, for refusing the office of sheriff. (2 *Str.* 1193. 1 *Wils.* 18.) Nor against an offender for usury, after the penalty for the offence is lapsed to the crown. (2 *Str.* 1434.) Nor for words spoken of a justice in his public character. (2 *Str.* 1157.) Nor for attempting subornation. (*B. R. H.* 24.) Nor for sending a challenge, if the informant had previously imparted a challenge. (*Burr.* 316, 402.) Nor in favor of one cheat against another cheat. (*Burr.* 548.) Nor for a general charge of extortion. (*Str.* 999.) Nor for striking a magistrate in the execution of his office, if the magistrate struck first. (*B. R. H.* 240.) Nor for an offence against a private statute. (*Burr.* 385.) Nor if a civil suit is depending, upon the same subject. (*B. R. H.* 241.) Nor against the members of a corporation, for a misapplication of the corporation money. (*Bl.* 542.) Nor against a magistrate for having improperly convicted a person, unless the party complaining make an exculpatory affidavit. (*Rex. v. Watson*, 2 *Term. Rep.* 199.) And in general the discretion of the court in granting an information is guided by the merits of the person applying; by the time of application; by the nature of the case; and by the consequences which may possibly result from the granting it. *Rex. v. Webster*, 3. *Term. Rep.* 388.

*Informations have been granted in the courts in England, in the following cases.*

4. The court will grant an information for reproaching the office of magistracy, or defaming the character of magistrates. (*Carth.* 14.) For taking away a young woman from her guardian; although chancery has committed the offender for a contempt. (2 *Str.* 1107. *Andr.* (310.) Or from her putative father. (*Str.* 1162.) For examining a person on oath, upon an arbitration, on an indictment, without putting the depositions into writing, the defendant being a commissioner appointed for taking affidavits. (See 1 *Salk. by Evans*, 374, note (1.) For demanding a shilling by a justice, to discharge his warrant, and committing the party for not paying it. (1 *Wils.* 7.) For seducing a man to marry a pauper, in order to exonerate the parish. (1 *Wils.* 41.) For seducing a woman habituated to drinking to make her will. (2 *Burr.* 1099.) For voluntarily absenting, by a justice, from sessions. (1 *Str.* 21.) For refusing to put an act in execution. (1 *Str.* 413.) For bribing persons to vote at corporation elections. (2 *L. Raym* 1377.) For publishing an obscene book. (*Str.* 788.) For unduly discharging a debtor by judges of an inferior court. (*Hard.*

183.) For refusing, by the captain, to let the coroner come on board a man of war. (*Str.* 1097.) For keeping great quantities of powder. (*Str.* 1167.) For a justice making order of removal, and not summoning the party. (*Andr.* 238.) For impressing a captain as a common seaman, maliciously. (1 *Bl.* 19.) For contriving the escape of prisoners of war. (1 *Bl.* 286.) For giving a ludicrous account of a marriage between an actress and a married man. (1 *Bl.* 294.) For contriving pretended conversations with a ghost, with intention to accuse another of having murdered the body of the disturbed spirit. (1 *Bl.* 392, 401.) For procuring a female apprentice to be assigned, though with her own consent, to another, for the purposes of prostitution. (1 *Bl.* 439.) Against a justice of peace, as well for granting as for refusing an ale licence improperly. (*Rex. v. Holland*, 1 *Term. Rep.* 692.) Against a justice of the peace, who, from illegal and corrupt motives, discharges the person committed by another magistrate under the vagrant act. (*Rex. v. Brooke*, 2 *Term. Rep.* 190.) For entering libellous reflections in the books of a corporation, respecting the administration of justice, in a cause in which the corporation were party. (*Rex. v. Watson*, 2 *Term. Rep.* 199.) Against a person whose trial is coming on at the assizes for distributing hand-bills in the assize town, vindicating his conduct and reflecting on the prosecutors. *Rex. v. Jolliffe*, 4 *Term. Rep.* 285.

5. By the laws of *Virginia*, 'No information for a trespass or misdemeanor shall be filed in any court, but by express order of the court, entered on record; nor unless the party supposed to be culpable shall have failed to appear and shew good cause to the contrary, having been required so to do by a summons, appointing a convenient time for that purpose, served upon him, or left at his usual place of abode.' 1 *Rev. Code*, p. 105, sect. 24.

¶ This law further required, that the name and surname of the prosecutor, with his residence and addition, should be written at the foot of the information before it be filed, and of every bill of indictment for a trespass, or misdemeanor before it be presented to the grand jury. *Ibid.*

But it was afterwards declared, 'That where any information shall be filed by the attorney for the commonwealth, by express order of the court entered of record, the party supposed to be culpable having failed to appear, and shew good cause against such order, having been required so to do by summons, appointing a convenient time and place, served upon him, or left at his usual place of abode, no prosecutor shall be required on such information. Nor shall any prosecutor be required on an information or bill of indictment for a trespass or misdemeanor, filed or sent to a grand jury, which shall be filed or sent to a grand jury, on, and in consequence of a previous presentment of a grand jury made on their own knowledge, or on the information of any two of their own body.' 1 *Rev. Code*, p. 431.

6. If the grand jury, to whom a bill of indictment for a trespass or misdemeanor be preferred, do not find the bill; or if the defendant appear to shew cause against filing such information or indictment, and the prosecutor does not proceed further; or if the defendant be found not guilty by the petit jury, he shall recover his costs against the prosecutor, where one is required. 1 *Rev. Code*, p. 105, sect. 25.



7. In all such cases the fine or amercement, which ought to be according to the degree of the fault and the estate of the defendant, shall be assessed by a jury, &c. *Ibid.* sect. 26.

*Form of an information qui tam.*

county to wit.

Be it remembered, that A J, of                      in the county of                      gentleman, who, as well for the commonwealth as for himself, doth prosecute, cometh before the justices of the peace for the commonwealth, assigned to keep the peace in the said county, and also to hear and determine divers felonies, trespasses and other misdemeanors, in the said county committed, at a court holden at                      in and for the said county, the                      day of                      in the year of our lord                      and in the                      year of the commonwealth, in his proper person; and as well for the commonwealth as for himself, giveth the court here to understand and be informed, that A O, late of                      in the county aforesaid, yeoman, on the                      day of                      in the year aforesaid, at                      aforesaid, in the county aforesaid, not regarding the laws and statutes of this commonwealth, but intending to, &c. with force and arms *here insert the offence with the same precision as in an indictment*) against the form of the statute in that case made and provided. Whereupon the aforesaid A J, as well for the said commonwealth, as for himself, prayeth the advice of this court in the premises; and that the aforesaid A O may forfeit the sum of                      according to the form of the statute aforesaid; and that the same A J may have one moiety thereof, according to the form of the statute aforesaid; and also that the aforesaid A O may come here into this court, to answer concerning the premises.

If the information is filed by the attorney for the commonwealth, *ex officio*, and not at the instance of a common informer, as in the foregoing precedent, then the form may be thus:

Be it remembered, that                      attorney for the commonwealth in the court of                      who for the said commonwealth in this behalf prosecutes, in his own proper person comes here into the court of the said commonwealth, on the                      day of                      and in the year                      of the commonwealth, and for the said commonwealth gives the court here to understand and be informed, &c.

☞ For an information against *slaves*, see title 'SLAVES.'

INNS, INNKEEPERS, see ORDINANCES.

INQUISITION, see PRESENTMENT.

## INSOLVENTS.

1. By the humane policy of the Virginian laws, the idea of relieving poor persons imprisoned for debt was very early conceived. So early as the year 1644, we find an act which, after reciting that several poor persons were then lying in the sheriff's hands, under execution 'for

tobacco, corn, and other commodities, which truly in kind they had not,' declared, that in such cases the inventory of their estate being produced, upon oath, in presence of the creditor, the commissioners (justices of the peace) should determine what should be valued for satisfaction of the debt. (See 1 *Stat. at large*, p. 296.) In an act of 1647, the same principle is preserved, varying only in its application. By that act the creditor was compelled to accept of property tendered to him by his debtor, who is in execution; to be appraised by two honest men mutually chosen; and if they could not agree, then the two next adjoining commissioners to determine the value. (See 1 *Stat. at large*, p. 346.) In the revisal of 1657, the last mentioned law was re-enacted, with a proviso, that the debtor should not be at liberty to give up what part of his property he pleased, but that the sheriff should seize any part, acting indifferently between the debtor and creditor. 1 *Stat. at large*, p. 453. See also acts of 1705, ch. 37, 51.

2. The principle of the insolvent laws, as they now exist, and have existed since the year 1726 (see *L. V. edit.* 1733, p. 364, 5.) is, that the debtor shall deliver in a schedule of his whole estate, real, personal, and mixed, whether in possession, remainder, or reversion, or whether held by himself or by any other in trust for him; and having taken the oath prescribed by law, he may be discharged; but the creditor may, at any time afterwards sue out a *scire facias*, to have execution of any lands, goods or chattels, which the debtor may acquire.

The details of this law are too lengthy for insertion; but whatever relates to the discharge of an insolvent debtor may be found in the following parts of the first volume of the *Revised Code*, viz. ch. 176, sect. 2, p. 324. Ch. 151, sect. 38, 39, 40, 41, 42, 43, 44, 45, 46, 52. Ch. 249, sect. 8, p. 391, *which see*. Also, 2 *Rev. Code*, p. 135, *by which it appears, that after a debtor has had the prison bounds for one year, he shall be committed to close prison*.

3. ¶ The thirty-eighth section of the act of 1793 (*Rev. Code*, p. 303) having given to a superior court, or to two judges thereof, when the court is not sitting, power to discharge an insolvent debtor, and the act of 1794 (1 *Rev. Code*, ch. 176, p. 324, sect. 2.) having, *in terms*, given such power to two justices of the peace only, and moreover the thirteenth section of the last recited act having repealed so much of the thirty-eighth section of the act of 1792, as is contrary to the act of 1794, some of the judges of the general court have refused, in any case, to discharge an insolvent debtor, supposing that the power is now conferred on the inferior courts, or two justices thereof, exclusively.

4. If the debtor be able to pay his own prison fees, the jailor cannot demand them of the creditor, as for an *insolvent* debtor. Thus when the debtor took the benefit of the prison rules, and hired a house within the bounds thereof, and was able to maintain himself; but the jailor demanded and received from the creditor the *per diem* allowance for the prison fees, which he regularly paid over to the debtor, the creditor was permitted to recover them back from the jailor, in an action for money had and received to the plaintiff's use. 1 *Call.* 540.

5. So, where a debtor had given bond and security for the prison bounds, and rented a house therein, in which he resided, and not in the prison, and was transferred from one sheriff to his successor, who

demand the prison fees of the creditor, and for non-payment, or security to pay the same, *discharged the debtor*, it was held that he was not discharged *according to law*, and the security was made liable for the debt. *Meredeth's adm. v. Duval. March term, 1810. 5 H. & M. Reports.*

But it is now expressly provided by law, that neither a creditor nor jailor is bound to support a debtor, if he has taken the prison bounds. 2 Rev. Code, p. 36.

*(A) Petition of an insolvent debtor for a discharge.*

To the worshipful court of \_\_\_\_\_ county, or, the corporation of \_\_\_\_\_ or, to J P, or J P and K P, justices, &c. *as the case may be.*]

The petition of A P humbly represents, that your petitioner, who is an insolvent debtor, is now confined in the jail of \_\_\_\_\_ as a prisoner, on an execution at the suit of B C, &c. (*mention the execution or executions*) which he is unable to discharge. He, therefore, prays the benefit of the act of the General Assembly made and provided for the relief of insolvent debtors.

A. P.

*(B) Warrant by a single justice to bring the prisoner before the court, while sitting.*

county, to wit.

To the keeper of the jail of the said county.

Whereas A J, of, &c. now a prisoner upon execution for debt, in your custody, hath, by his petition to me, J P, a justice of the peace for the county of \_\_\_\_\_ aforesaid, prayed that he may be discharged out of custody, pursuant to the act of the General Assembly in that case made and provided. These are, therefore, in the name of the commonwealth, to require you to bring immediately before the justices of the peace of this commonwealth, now sitting in court, at the courthouse of the said county of \_\_\_\_\_ the body of the said A J, together with a list of the several executions with which he stands charged in the said jail; and have then there also this precept. Given under my hand and seal, &c.

With this warrant the jailor must return a list of the several executions with which the prisoner is charged.

*(C) Warrant by two justices to bring the prisoner before them, when the court is not sitting.*

county, to wit.

To the keeper of the jail of the said county.

Whereas A J, of, &c. now a prisoner taken in execution of debt, and in your custody, hath, by his petition to us, J P and K P, two of the justices of the peace for the said county, prayed that he may be discharged out of custody, pursuant to the act of the General Assembly in that case made and provided. These are, therefore, in the name of the commonwealth, to require you to bring before us, or any two justices

of this county, at the court-house of this county, on the      day of  
 next, the body of the said A J, together with a list of the several  
 executions wherewith he stands charged in your jail; and have then  
 there this precept. Given under our hands and seals, &c.

☞ Before taking the oath, the prisoner must make and subscribe  
 a schedule of his whole estate, real and personal, &c. *See the oath.*

☞ For the oath to be taken by the prisoner, see 1 *Rev. Code*, p.  
 303.

### (D) *Warrant of discharge.*

county, to wit.

A, B, C, D, E, F, &c. (all the members of the court) justices of the  
 peace, and of the court of the said county [or J P and K P, two of the  
 justices of the peace for the county of      aforesaid.]

*To the sheriff or keeper of the jail of the said county.*

We hereby command you, in the name of the commonwealth,  
 forthwith to release and set at liberty A J, a prisoner now in your cus-  
 tody, by virtue of an execution against him, at the suit of      for the  
 sum of      (if more executions, mention them all) the said A J having  
 complied with the directions of the act of the General Assembly for  
 the relief of insolvent debtors, if the said A J is detained in your cus-  
 tody for no other cause than the execution (or executions) aforesaid;  
 and for your so doing this shall be your warrant. Given, &c.

INSPECTORS, see TOBACCO.

## JAIL AND JAILER.

FOR BREAKING JAIL, see title PRISON BREAKING.

- I. *Building and repairing jails.* II. *Who shall have the*  
*keeping of jails.* III. *Jailer shall receive prisoners.*  
 IV. *How they shall be maintained; and the fees allow-*  
*ed for maintenance.* V. *How prisoners shall be re-*  
*strained and kept.* VI. *How they shall be delivered.*  
 VII. *Of jailers permitting escapes.*

### I. BUILDING AND REPAIRING JAILS.

The power and duty of magistrates in building jails, &c. also the pe-  
 nalty for neglect, and the remedy given the sheriff against the mem-  
 bers of the court, for the insufficiency of the jail, may be found in  
 1 *Rev. Code*, ch. 67, sect. 13, p. 86.



## II. WHO SHALL HAVE THE KEEPING OF JAILS.

1. The jail itself is the commonwealth's, but the keeping thereof is incident to the office of sheriff, and inseparable from it. 2 *Inst.* 589.

2. A jailer in fact, is as much punishable for a misdemeanor, as if he were a rightful jailer. 2 *Hawk.* 134.

3. Judge *Blackstone* says, jailers are the servants of the sheriff, and he must be responsible for their conduct. 1 *Bl. Com.* 346.

## III. JAILER SHALL RECEIVE PRISONERS.

All felons should be imprisoned in the common jail.

And if a jailer refuse to receive a felon, or take any thing for receiving him, he shall be punished. *Dalt.* c. 170.

☞ On what terms prisoners of the United States shall be received, see 1 *Rev. Code*, p. 43, 342.

## IV. HOW THEY SHALL BE MAINTAINED; AND THE FEES ALLOWED FOR MAINTENANCE.

1. Lord *Coke* says, the jailer cannot refuse the prisoner victuals, for he ought not to suffer him to die for want of sustenance. 1 *Inst.* 395.

2. But the maintenance of prisoners is now provided for by several statutes.

3. The fees to the keepers of jails, for the maintenance of debtors and criminals, are to be settled by the courts; provided they shall not exceed thirty-four cents a day. See 1 *Rev. Code*, ch. 213, p. 368, 9.

4. For the maintenance of a runaway, the fee is seventeen cents a day, and twenty-five cents for committing, and the same for release-ment. *Ibid.* p. 246, sect. 7.

☞ How a jailer shall recover his fees of a creditor, for his debtor committed to prison, see 2 *Rev. Code*, p. 86, sect. 7.

## V. HOW PRISONERS SHALL BE RESTRAINED AND KEPT.

1. The county jail is a prison for malefactors; but prisoners for debt, where escape lies against the sheriff for their escaping, may be kept in what place the sheriff pleases. *Ld. Raym.* 136.

2. It seemeth generally in all cases where a man is committed to prison, especially if it be for felony, or upon an execution, or but for a trespass or other offence, every jailer ought to keep such prisoner in safe and close custody; safe, that he cannot escape; and close, without conference with others or intelligence of things abroad. *Dalt.* c. 170.

And therefore if the jailer shall licence his prisoner to go abroad for a time, and then to come again, or to go abroad with a keeper, though he come again, yet these are escapes. *Ibid.*

3. And hereupon it is lawful for the jailer to hamper a felon with irons to prevent his escape. (1 *H. H.* 601. *Dalt.* c. 170.) And it is said that a jailer is no way punishable for keeping even a debtor in irons. (2 *Haw.* 152.) But the learned editor of *Hale's History* observes, that this liberty even in the case of a felon (much more in the case of a prisoner for debt) can only be intended, where the officer has just reason to fear an escape, as where the prisoner is unruly, or makes any attempt to that purpose; but otherwise, notwithstanding the common practice of jailers, it seems altogether unwarrantable, and contrary to the mildness and humanity of the laws of the commonwealth, by which jailers are forbidden to put their prisoners to any pain or torment. And lord Coke (2 *Inst.* 381.) is express, that by the common law it might not be done. 1 *H. H.* 601.

4. And if the jailer keep the prisoner more strictly than he ought of right, whereof the prisoner dieth, this is felony in the jailer by the common law; and this is the cause, that if a prisoner die in jail, the coroner ought to set upon him, and if the death was owing to cruel and oppressive usage on the part of the jailer, or any officer of his, it will be deemed wilful murder in the person guilty of such duress. 3 *Inst.* 91. *Foot.* 321, 322.

5. But if a criminal, endeavouring to break the jail, assault his jailer, he may be lawfully killed by him in the affray. (1 *Haw.* 71. 1 *H. H.* 496.) For jailers and their officers are under the same special protection, that other ministers of justice are. And therefore, if in the necessary discharge of their duty they meet with resistance, whether from prisoners in civil or criminal suits, or from others in behalf of such prisoners, they are not obliged to retreat as far as they can with safety, but may freely, and without retreating, repel force with force. And if the party so resisting happeneth to be killed, this on the part of the jailer or his officer, or any person coming in aid of him, will be justifiable homicide. (On the other hand, if the jailer or his officer, or any person coming in aid of him, should fall in the conflict, this will amount to wilful murder in all persons joining in such resistance. It is homicide committed in defiance of the justice of the commonwealth. *Foot.* 321.

6. But forasmuch as the jail is intended, in most cases, for custody, and not for punishment; and confinement itself, especially in such dismal abodes, as it is to be feared many of the jails are, is sufficiently afflictive and disconsolate; human nature will plead for those miserable objects, that their condition be rendered as tolerable as the case will admit of; particularly with regard to cleanliness, which is the parent of health; and wholesome air, which is life itself. A remarkable effect of want of care in this respect, sir Michael Foster takes notice of, in the case of one Mr. Clarke, who was brought to his trial at the *Old Bailey* sessions in 1750. It being a case of great expectation, the court and all the passages to it were extremely crowded. The weather also was hotter than is usual at that time of the year. Many people who were in the court were sensibly affected with a very noisome smell. And it appeared soon afterwards, upon an inquiry ordered by the court of aldermen, that the whole prison of *Newgate*, and all the passages leading thence into the court, were in a very filthy condition, and had been long so. What made these circumstances to be

at all attended to was, that within a week or ten days at most after the sessions, many people, who were present at Mr. Clarke's trial, were seized with a fever of the malignant kind, and few who were seized recovered. The symptoms were much alike in all the patients; and in less than in six weeks the distemper entirely ceased. At the time this disaster happened, there was no sickness in the jail, more than is common in such places. Which circumstance, that distinguisheth this from most of the cases of the like kind which we have heard of, suggests a very proper caution, not to presume too far upon the health of the jail, barely because the jail fever is not among the prisoners. For without doubt, if the points of cleanliness and free air have been greatly neglected, the putrid *effluvia* which the prisoners bring with them in their clothes or otherwise, especially where too many are brought into a crowded court together, may have fatal effects upon people who are accustomed to breathe better air; though the poor wretches, who are in some measure habituated to the fumes of a prison, may not always be sensible of any great inconvenience from them. The persons of chief note who were in the court at this time, and died of the fever, were sir Samuel Pennant, lord mayor for that year, sir Thomas Abney, one of the justices of the common pleas, Charles Clarke, esquire, one of the barons of the exchequer, and sir Daniel Lambert, one of the aldermen of London. Of less note, a gentleman of the bar, two or three students, one of the under sheriffs, an officer of lord chief justice Lee, who attended his lordship in court at that time, several of the jury on Middlesex side, and about forty other persons, whom business or curiosity had brought thither. *Fost. 74.*

## VI. HOW THEY SHALL BE DELIVERED.

1. The jailer being an officer whose attendance is always necessary on the court, and by some acts of assembly is made expressly so (see *V. l. p. 76.*) he should always be careful to certify to the courts, to which the prisoner stands committed, the *mittimus*, or warrant of commitment, in order that the person accused may receive his trial, and if found not guilty, may be discharged.

2. And if a jailer detains a prisoner in jail after his acquittal, unless it be for his fees (not for meat, drink, or lodging) this is an unlawful imprisonment. 2 *Inst. 53.*

3. And a jailer must not disobey a writ of *habeas corpus*, for want of his fees; but the court will not turn the prisoner over till the jailer be paid all his fees. 2 *Haw. 151.*

## VII. OF JAILERS PERMITTING ESCAPES.

### *I. In criminal cases. II. In civil cases.*

#### I. IN CRIMINAL CASES.

1. If the jailer *voluntarily* suffers a prisoner to escape, he shall be punished in the same manner as the prisoner ought to have been who escaped; and if he *negligently* suffered him to escape, he shall be pun-

ished by fine and imprisonment. And the sheriff shall answer for him. 2 *Hawk.* 134, 5, 6.

2. But the principal jailer is only fineable for the *voluntary* escape of a felon suffered by his deputy; for no man shall suffer capitally for any crime, but he who is actually guilty of it. *Ibid.* 135.

3. But for a negligent escape suffered by his bailiff, the sheriff is as much liable to answer, as if he had actually suffered it himself; and the court may charge either the sheriff or bailiff for it. And if a deputy jailer be not sufficient to answer a negligent escape, his principal must answer for him. *Ibid.*

4. But it will not be felony if the prisoner be permitted to escape, when no felony was committed. 2 *Inst.* 592.

## II. IN CIVIL CASES.

### I. WHAT SHALL BE AN ESCAPE.

1. An escape from the bounds of the prison, without the jailer's knowledge, is not a *voluntary* escape. 2 *Term. Rep.* 126.

2. An action lies for an escape, if he permits his prisoner to go at large, though he afterwards returns. 3 *Co.* 44. 1 *Rol.* 806. l. 13.

Though he returns the same day, and afterwards plaintiff proceeds to final judgment. *Ravenscroft v. Eyles*, 2 *Wils.* 294.

If the defendant, being taken in execution, be afterwards seen at large for any the shortest time, even before the return of the writ. 2 *Bl. Rep.* 1048.

Though he does not go out of the same county. 1 *Rol.* 806. l. 15.

Or out of the town where the jail is. *Ibid.* l. 24. *Hob.* 202.

Though he has a keeper with him. 3 *Co.* 44. a. 1 *Rol.* 806. l. 17, 20. *Plowd.* 37. *Hob.* 202.

Or upon any *habeas corpus* be permitted to go at large in the country. *Semb. Cro. Car.* 14. 3 *Co.* 44. a. *Mo.* 257, 299. *Per Hale*, 1 *Mod.* 116. *Hard.* 476.

Or if upon a *habeas corpus ad testificand*; he goes before and stays a long time after the assizes. *Semb.* l. *Mod.* 116.

3. If after judgment, and before any charge in execution, a prisoner is rescued, when brought out on a *habeas corpus*; it is not a good excuse for the sheriff, in an action of escape, and he shall answer it to the plaintiff. *Crompton v. Ward*. *Str.* 429.

4. If a prisoner is removed by *habeas corpus*, from B R to C B, and escapes, plaintiff in an action of escape need not set out the process in C B, against the prisoner. *Gambier v. Wright*. *Str.* 951.

5. If the recaption is after the action brought, it is still an escape. *Stonehouse v. Mullins*. *Str.* 873.


6. So an action lies for escape, where the prisoner was arrested by process out of an inferior court.

7. Though it be pleaded that the cause of action arose out of the jurisdiction, and that the officer had notice of it before the return of the writ: for the officer cannot examine that matter. *Comy. Rep.* 153. *Higgison v. Sheriff*.


Though the judgment was erroneous, or for one who sued without

colour. 3 *Mod.* 324. *Carth.* 148. 5 *Mod.* 413. 8 *Co.* 142. 2 *Bul.* 63. *Cro. El.* 164, 576. *Yel.* 42. *cont.*


8. So an action lies for an escape, though he was convicted for felony, before judgment and execution against him, and continued in prison for the felony; for until he be executed for felony, he is chargeable to the party *Sav.* 63. 1 *Leo.* 276. 2 *lev.* 84.

9. A rescue has been held to be no excuse for a jailer, charged with a wilful and voluntary escape. (5 *Burr.* 2812.)  *The whole court thought it a very HARD case, but that the authorities were too strong to be resisted.*

10. So where a mob, riotously and by force, demolished a jail, by which the debtors escaped, it was held that the sheriff or jailer was answerable. 4 *Term. Rep.* 789.


 But by the laws of Virginia, "no judgment shall be entered against any sheriff or other officer, in any suit brought upon the escape of any debtor in his or their custody, unless the jury who shall try the issue shall expressly find that such debtor or prisoner did escape with the consent, or through the negligence of such sheriff (or sergeant) or his officer or officers, or that such prisoner might have been retaken, and that the sheriff (or sergeant) and his officers, neglected to make immediate pursuit." 1 *Rev. Code*, p. 119, sect. 3.

*Provided*, that where a sheriff or other officer shall have taken the body of a debtor in execution, and shall wilfully and negligently suffer him to escape, an action of debt may be maintained, &c. *Ibid.*

11. An action of debt will lie against a sheriff of a county, for an escape, if the jailer discharge a prisoner who was in execution, although such discharge was ordered by the sessions, under the insolvent act, but it appeared that the sessions had no jurisdiction at the time of making the order. (8 *Term. Rep.* 424. *Brown v. Compton.* 1 *Salk.* 273. *pl.* 5.) And the case of *Orby v. Hales* (1 *Ld. Raym.* 3. 4 *Mod.* 353.) was held not to be law.  See *The Marshalsea case* (10 *Co.* 76. a.) as to the different effects of an officer acting under the judgment of a court having jurisdiction, and not having jurisdiction. See also, *Cro. Car.* 395. 1 *Str.* 711. 2 *Str.* 1002. 2 *Wils.* 382. 2 *Str.* 994.

12. An escape from the rules of the prison, without the sheriff's knowledge, is not a voluntary escape. But under a count for a voluntary escape, the plaintiff may give in evidence a negligent escape. 2 *Term. Rep.* 126. *Bonafous v. Walker.*

13. And a voluntary return of a prisoner, after an escape, before action brought, is equal to a retaking on a fresh pursuit; but it must be pleaded. *Ibid.*

14.  The difference between an arrest on mesne process and in execution is this; on the former the sheriff may permit the prisoner to go at large, provided he has him at the return of the writ; but in the latter case, if he voluntarily permit the prisoner to go at large, though only for a minute, he cannot afterwards retake him; in the former case, too, the sheriff may retake the prisoner after such permission. 2 *Term. Rep.* 172. *Atkinson v. Matteson.* See further on this subject, 2 *Bl. Rep.* 1048. 1 *Bos. & Pull.* 24. 2 *H. Bl.* 108. 5 *Term. Rep.* 37.

## II. WHAT SHALL NOT BE AN ESCAPE.

1. But it will not be an escape, if the party never was in his custody. As if the old sheriff does not deliver him over upon such execution. 3 Co. 72. 2 Cro. 588. Poph. 85. 2 Lev. 54.

2. If he be arrested, but not actually committed to jail, the jailer shall not be charged for an escape. 1 Rol. 806. l. 30.

3. So if a *committitur* be entered upon the roll, but the party is not taken. 1 Sid. 220.

4. So if a man bailed renders himself in discharge of his bail, and a *reddidit se* is entered in the judge's book, and a *committitur* entered with the proper officer; yet if a *committitur* be not entered with the marshal of B R, or a rule served upon him, he shall not be charged for an escape, though the bail be discharged. 1 Sal. 272, 3.

5. So if the entry be, that *virtute* of an *habeas corpus* to a judge of B R, *debito modo commissus fuit mar*; for that cannot be by virtue of the *habeas corpus*. 2 Sho. 17, 18.

6. It must appear that the commitment is of record; therefore, if it is laid that the prisoner was committed to the custody of the marshal, at the suit of plaintiff, by A, one of the justices of the commonwealth, it is ill. Str. 1226.

7. If he be at the house of the jailer, but not within the prison. Cro. Car. 210.

8. So it will not be an escape, where the prisoner was not in custody at the suit of the plaintiff. As, if he was taken by a *capias utlagatum*, or a *capias pro fine*; where a *capias* does not lie in such suit. 1 Rol. 810. l. 30.

9. Or when he was not charged at the prayer of the plaintiff. Ibid. 1 Leo. 263.

10. Or was arrested and suffered to go at large, before the writ of execution was delivered to the sheriff. 1 Rol. 809. l. 30.

11. Or upon a *capias*, where no *capias* was awarded by the court. Ibid. l. 35.

12. So it will not be an escape, if he goes out of prison, by reason of a sudden fire in the jail. Ibid. 808. l. 7.

13. Or the jail be broke by the commonwealth's enemies. Bro. Escape 10. 1 Rol. 808. l. 5.

14. Or the defendant be rescued upon a *mesne* process, before he was in jail. Mar. 1. 1 Rol. 807. l. 35. 2 Cro. 419. 2 Lev. 144. 1 Rol. 389, 440.

15. Though the *rescous* be not returned. (2 Lev. 144.) Or if it be. 1 Rol. 140.

16. So if the defendant be retaken upon fresh suit, before the action commenced for the escape. (1 Rol. 808. l. 50. 3 Cro. 52. 13 H. 7, 2. Godb. 434. F.N.B. 130. B.) Or voluntarily return. 2 Term Rep. 126.

17. Though the fresh suit was not begun till a day and a night after the escape. 1 Rol. 809. l. 10. 2 Rol. 681. l. 50. 3 Co. 52. Mo. 660. Poph. 41.

18. Though he did not retake him till he fled into another county. Bro. Escape 4. 3 Co. 52.

19. Though he was out of sight. *Poph.* 41. 3 *Co.* 52. 14 *H.* 7, 1. a.

20. Though he did not retake him till seven years after, if it was upon fresh pursuit. 13 *Ed.* 4, 9. a. *Semb. Godb.* 177.

21. So a voluntary return of a prisoner, after an escape, before action brought, is equivalent to a retaking on a fresh pursuit: but it must be pleaded. 2 *Term. Rep.* 126.

22. But fresh suit is no plea, where the escape was voluntary in the sheriff. 2 *Rol.* 283.

23. Or after an action brought, though before plea. *Semb.* 2. *Rol.* 283. *R. cont. Lat.* 200.

24. So the sheriff shall not be charged for an escape, if the prisoner goes out of prison with the assent of his creditor. 2 *Inst.* 382.

25. Though the assent be only by *parol*, it shall be a bar. *Ibid.* *Dy.* 275. a.

26. But an assent by *parol*, after an escape, does not discharge the sheriff. *Dy. in marg.*

27. So it will not be an escape, if the sheriff, upon a *habeas corpus*, brings his prisoner to the superior court, though he goes out of the direct way. 3 *Co.* 44. *Mo.* 299.

28. So if he goes with a keeper to counsel, &c. when he is in execution for the commonwealth's debt, though not in the case of a common person, because the jailer may retake him. *Sav.* 29.

29. So if discharged upon an *audita querela*, though the writ be afterwards vacated. *Mo.* 354.

30. So if a prisoner, brought by *habeas corpus*, goes out of the custody of the sheriff, and returns the next morning, and appears at the return of the writ. *Mo.* 257.

So if a prisoner goes out of the rules of the prison, with the consent of the plaintiff, without a keeper or rule of court, upon an intent to agree with the plaintiff, and no agreement is made; yet the prisoner shall be discharged upon an *audita querela* (*Sti.* 117. *Semb. cont.*) if the plaintiff assents upon condition that it shall not prejudice his execution. *Dy.* 275. a.

### III. WHEN HE SHALL BE RETAKEN, &c. AFTER AN ESCAPE.

1. If the prisoner escapes by negligence of the sheriff, the sheriff may retake him, and he shall not have an *audita querela*. 3 *Co.* 52. b. 1 *Sid.* 330. *Mo.* 660. *Dub. Sho.* 70. *Adm. Sho.* 177.

2. Or he may have an action on the case against the prisoner for his escape; whereby he becomes subject to the action of the party. 3 *Co.* 52. b. *Mo.* 660. *Mo.* 404, 597. *Cro. El.* 53, 237. 1 *Leo.* 237. *Lut.* 64.

3. And this, before an action or recovery against the sheriff, as well as after. *Mo.* 660. *Godb.* 125. *Cro. El.* 53.

4. Though the party afterwards acknowledges satisfaction upon record; for that goes only in mitigation of damages (1 *Leo.* 237. *Semb. cont.*) if he does not shew specially how satisfied. *Cro. El.* 237.

5. So if a prisoner escapes, and afterwards returns to the prison,



the plaintiff may admit him in execution, though he has a remedy against the sheriff. *Cont. Hob.* 202. *R. acc.* 1 *Vent.* 269. 2 *Lev.* 109, 132.

6. Or may retake him by a new *capias ad satisfaciendum*, if the first be not returned and filed. 3 *Cro.* 52. b.

7. So he may retake him in all cases upon a negligent escape; for the sheriff may be insufficient. *R. cont. Hob.* 202. *R. acc.* 1. *Sid.* 330. 1 *Vent.* 4, 269.

8. So though the escape was voluntary by the jailer, and without his consent. 1 *Sid.* 330. 1 *Vent.* 4. 1 *Lev.* 211. 2 *Mod.* 136. 2 *Jon.* 21. *Adm. Sho.* 177. *Semb. cont. Hob.* 202.

9. So if a prisoner be dismissed upon a wrongful *audita querela*, he may be retaken, and shall be in execution. *Mo.* 354.

10. So after an escape, the plaintiff may have debt or a *scire facias* against the defendant, upon the former judgment. 1 *Vent.* 269. *Cart.* 212. 2 *Jon.* 21. *Lut.* 1266. *Sho.* 174, 249.

11. Though it was with his consent subsequent. (1 *Salk.* 271.) Though he paid the money to the jailer. 2 *Jon.* 97.

12. So if a man taken in execution be rescued, he may be retaken, or a *scire facias* lies against him. *Cro. Car.* 240.

13. But if the sheriff suffers a voluntary escape, he will not have an action upon the case against the prisoner. *Mo.* 597.

14. Or if he retakes him, the prisoner shall have an *audita querela*. 3 *Co.* 52. b. 1 *Sid.* 330.

15. After voluntary escape, the jailer cannot retake the prisoner; but after involuntary he may, without warrant, and upon a *Sunday*. *Barnes* 373. 5 *Term Rep.* 25.

16. So if the sheriff permits a voluntary escape, with consent of the plaintiff, he never can be retaken by the sheriff, or the plaintiff. *Sho.* 174. 2 *Leo.* 119.

17. If the consent of the plaintiff be precedent to the escape; otherwise, if subsequent. 1 *Salk.* 271.

18. Yet if A permits a voluntary escape, and quits his office to B, to whom the prisoner returns; B ought to retain him: otherwise it will be an escape in him. 1 *Vent.* 269. 2 *Lev.* 109. *Semb. Mod. Ca.* 188. *Semb. cont. Hob.* 202.

19. Or if the offence descends to B. *R.* 2 *Lev.* 109.

20. And an action for the escape lies against A or B, if he also permitted an escape, at the election of the plaintiff. 2 *Lev.* 132.

21. A resists the service of an order of chancery, is committed for the contempt, goes at large, retaken on an escape warrant, and committed to *Newgate*; escape warrant superseded; the contempt not being for not obeying a decree, and A sent to the former prison. *Str.* 99.

22. If a man escapes and returns again, and then commits a second escape, he cannot be taken up for the first escape, it being purged by his return. *Str.* 423.

23. So if he be discharged by agreement, after commitment upon an escape warrant, he shall not be afterwards retaken. *Mod. Ca.* 254.

24. If the defendant was entitled to his discharge at the time of his escape, and would be entitled to it as soon as taken on the escape warrant, the court will supersede the warrant. *Str.* 401.

25. A man taken upon an escape warrant of a judge, after his patient is determined, shall be discharged. *Ld. Raym.* 1513.

26. If a prisoner escapes, and plaintiff sends an order for his discharge, the jailer cannot retake him for his fees. *Str.* 909.

#### IV. WHAT REMEDY BY ACTION FOR AN ESCAPE.

1. By the common law, the sheriff, and every jailer, ought to keep persons in execution in *salva custodia*. 3 Co. 44.

2. And if such a prisoner escapes, an action upon the case lies against him. 2 *Inst.* 382. 1 *Roll.* 99. l. 10, 15. 2 *Cro.* 289. 2 *Lev.* 159.

3. And debt lies in all cases, as well for a negligent as a voluntary escape, on final process. 2 *Inst.* 382. *Plowd.* 36, b. 2 *Lev.* 159. 15 *Ed.* 4, 20. *Str.* 873. 2 *H. Bl.* 108. 1 *Rev. Code*, 119.

4. And may be sued by writ or by bill of debt. 2 *Inst.* 382. *Dub. Plowd.* 38. a. 42. *Fd.* 3. 13. a.

5. So, if two are in execution and one of them escapes. 1 *Roll.* 205.

6. Case (but not debt) lies for the escape of an outlaw on *meane process*. *Str.* 901.

7. An administratrix may maintain an action in her own name against the marshal for the escape of a prisoner in execution, on a judgment obtained by her as administratrix. 2 *Term. Rep.* 126.

8. Under a count for a voluntary escape, the plaintiff may give evidence of a negligent escape, and the defendant may plead a retaking on a fresh pursuit to such a county, without traversing the voluntary escape. *Ibid.*

9. In debt for an escape against the sheriff, the endorsement *non est inventus* on the *ca. sa.* is sufficient evidence of its having been delivered to him. *Cowp.* 63.

10. A legal arrest must be proved in such action. *Ibid.*

11. In debt against the sheriff or jailer for an escape, the jury cannot give a less sum than a creditor would have recovered against the prisoner, viz. the sum endorsed on the writ, and the legal fees of execution. 2 *Term. Rep.* 126.

12. At common law, an action on the case only lay, in which the plaintiff might recover damages for the officer's neglect; but still an action lay against the debtor. An action of debt was given by statute; but this being in affirmance of the common law, the plaintiff has his election. See 1 *Saun.* 38, note (2) by *Wms.*

#### V. AGAINST WHOM THE ACTION SHALL BE BROUGHT.

1. The action for escape shall be brought against him who has the custody of the jail. 3 *Com. Dig.* 598, by *Rose*.

2. Though he has it *de facto* only, and not *de jure*. 2 *Inst.* 381, 2.

3. As, it shall be against the sheriff, not against his deputy; as the jailer who takes care of the prison in the county. 2 *Inst.* 382. 1 *Roll.* 94, l. 30. *Semb.* *Hard.* 54.

4. Or the sergeant who makes the arrest. 1 *Rol.* 806, l. 45.
5. So it lies against the old sheriff, if he omits to deliver any prisoner by indenture to the new. 2 *Leo.* 54.
6. But an action for an escape shall not be against the superior, if the inferior be sufficient. 2 *Inst.* 382.

☞ This must be understood, however, of those cases where a person has the custody of a jail of freehold or inheritance, and commits it to another person, as is frequently the case in England. 2 *Bac. Abr. Gwil. edit.* 518. See *infra*, No. 7.

7. For if a jailer, who is the sheriff's servant, suffers a prisoner to escape, the action must be brought against the sheriff, not against the jailer; for an escape out of the jailer's custody is, by intendment of law, an escape out of the sheriff's custody. 2 *Bac. Abr. Gwil. edit.* 519.

8. As to the escape of *criminals*, whoever *de facto* occupies the office of jailer is liable. *Ibid.* In margin, note (b.)

9. So, an arrest by the sheriff's officer is, in judgment of law, the same as if the arrest were by the sheriff in person; and if such officer suffer the party arrested to escape, the action must be brought against the sheriff. 2 *Bac. Abr. Gwil. edit.* 519.

*Indictment against a jailer, for negligently permitting a prisoner committed to his custody, by virtue of a justice's warrant, to escape.*

The jurors for, &c. upon their oath present, that on the       day of       in the year       I D, esquire, then being one of the justices of the commonwealth, assigned to keep the peace of the said commonwealth, in and for the said county of       and also to hear and determine divers felonies, trespasses, and other misdemeanors committed in the same county, in due form of law, did make his warrant of commitment under his hand and seal, to wit: at the parish of S, in the said county of       bearing date the same day and year aforesaid, directed to the keeper of the common jail in and for the said county of       by which said warrant of commitment the said keeper was required to receive into his custody the body of W M, who was therewith sent to him the said keeper (the said W M having been brought before the said I D, the justice aforesaid, and charged upon the oath of I S, with assaulting and robbing him of his watch and money, to wit, one shilling and some half-pence, in a certain place near the commonwealth's highway, in the parish of S, in the said county of       ) and him safely to keep until the then next court, &c. for the said county, as by the same warrant more fully appears; by virtue of which said warrant of commitment, afterwards, to wit, on the said       day of       in the       year aforesaid, at the parish of       in the said county of       A B then being the keeper of the common jail of the said county of       did receive the said W M into his custody in the said common jail there situate. And the jurors aforesaid, upon their oath aforesaid, do further present, that the said A B, late of the parish of       in the said county of       yeoman, so being keeper of the said common jail, and having the said W M in his custody in the said

jail on that occasion, afterwards, to wit, on the                      day of                      in the                      year aforesaid, at the parish aforesaid, in the                      county aforesaid, unlawfully and negligently did permit and suffer the said W M (so being a prisoner committed to the said jail as aforesaid) to escape and go at large from and out of the custody of him the said A B, out of the said prison, wheresoever he would, to the great hindrance and destruction of justice, in contempt of the laws of this commonwealth, to the evil example of all others in the like case offending, and against the peace and dignity of the commonwealth.

For more on this subject, see title 'ESCAPE.'

## JUDGMENT.

1. OF judgments, some are fixed and stated; as in cases of treason, felony, and misprisions; the particular form of which may be seen under their respective titles.

2. Others are discretionary and variable according to the particular circumstances of each case. Thus, for crimes of an infamous nature, such as petit larceny, perjury, or forgery at common law, gross cheats, conspiracy not requiring a villainous judgment, keeping a bawdy house, bribing witnesses to stifle their evidence, and other offences of the like nature; it seems to be in a great measure left to the prudence of the court to inflict such corporal punishment, and also such fine, and binding to the good behaviour for a certain time, as shall seem most proper and adequate to the offence. *Haw. B. 2. c. 48, sect. 14.*

3. The court may assess a fine, but cannot award any corporal punishment against a defendant, unless he be actually present in court. *Ibid. sect. 17.*

4. Where there are several defendants, a joint award of one fine against them all is erroneous; for it ought to be severally against each defendant, for otherwise, one who hath paid his proportionate part might be continued in prison till all the others have also paid theirs, which would be in effect to punish him for the offence of another. *Ibid. sect. 18.*

5. A fine is under the power of the court, during the term in which it is set; and may be mitigated as shall be thought proper; but after the term, it admits of no alteration. *Ibid. sect. 20.*

6. Peculiar punishments are appointed for several offences, as pillory, stocks, imprisonment, and the like; and in all these cases, no room is left for the justices discretion, for they ought to give judgment, and to inflict the punishment in all the circumstances thereof, as such statute doth direct. *Da't. c. 188.*

7. And by many acts of Assembly the fine imposed on the offender, in the cases therein mentioned, is to be assessed by a jury, and consequently not discretionary with a court.

8. Judgment of outlawry is given by the coroner at the fifth county court, upon the party's not appearing to the exigent. *Haw. B. 2. c. 48, sect. 21.*

## JURIES AND JURORS.

THE trial by jury has long been the subject of encomium among the most celebrated writers on the English law. Its origin has been traced up as far back as the Saxons themselves, and its use has continued through the various revolutions sustained by our British ancestors. But while we admire the theory of this institution as delineated by its enthusiastic advocates, we have to lament, that both in England and America it is, in practice, too susceptible of abuse.

But because an institution may be abused, it does not necessarily follow that it should be wholly rejected. It is the fate of all human productions; and we ought rather to submit to it in this instance, than lose the many invaluable advantages peculiar to the trial by jury. Its utility in preserving the liberty of the people has been fully proved by its long duration in England; and from that nation's having retained its liberties longer than any other part of Europe, where the trial by jury was either not known, or entirely laid aside. And so sensible of this important truth have the people of America been, that it is made an express article in most of the constitutions of the several United States, and was strongly insisted on, and at length obtained as an amendment to the federal constitution, *that the ancient trial by jury should be held sacred.* It should therefore be our study to preserve this palladium of our liberties from those abuses and encroachments, which can alone endanger the institution itself, and with it the rights of the people. See 3 *Bl. Com.* ch. 23.

*I. Who may or may not be jurors. II. How and by whom summoned. III. Of the number of jurors. IV. Of the challenge of jurors. V. Of the demeanor of jurors in giving their verdict. VI. Of the indemnity and punishment of jurors.*

### I. WHO MAY, OR MAY NOT BE JURORS.

For the qualification of jurors, see 1 *Rev. Code*, ch. 73, p. 101. ch. 158, p. 313.

## II. HOW AND BY WHOM SUMMONED.

On this subject see 1 *Rev. Code*, ch. 73, p. 99, 100, 101, and 2 *Rev. Code*, *Index*, titles 'GRAND JURIES, JURIES, JURORS, INQUEST, VEXNIRE MEN.'

## III. OF THE NUMBER OF JURORS.

1. Although the *grand jury* in England has long consisted of any number between twelve and twenty-three, and in Virginia of any number between sixteen and twenty-four, *twelve* of whom, at least, if a majority, must agree; and the *petit jury* in both countries of twelve, who must be *unanimous*; yet this has not been uniformly the case, nor has the rule existed from time immemorial. See *Hargr. Co. Lit.* 155, a note (3.) 3 *Bl. Com.* 376. *Christian's note* (20.) 2 *Hale's Hist. Com. Law*, 187. 1 *Rev. Code*, ch. 73, p. 99, 100.

2. For many years after the first settlement of Virginia, all presentments were made by the *church wardens*. (See 1 *vol. Stat. at large*, *index*, title 'CHURCH WARDENS.') In the year 1645, we meet with the first act directing grand juries to be empannelled; but the law is silent as to their number or qualifications. (1 *Stat. large*, 304.) In 1657, the law was re-enacted in a revisal. (1 *Stat. large*, 463.) But in 1658 it was repealed. (1 *Stat. large*, 521.) In the revisal of 1661-2, the law was again enacted, with a few amendments. (2 *vol. Stat. large*.) In 1705, the number of the grand jury was fixed between fifteen and twenty-four, and so continued till the year 1777, when it was altered to sixteen and twenty-four. See *V. L. edit.* 1733, p. 181. *Edit.* 1752, p. 270. *Edit.* 1769, p. 188. *Edit.* 1785, p. 75. 1 *Rev. Code*, ch. 73, p. 99, 100.

3. A majority of the grand jury, being not less than *twelve*, must concur, before any presentment can be made. 2 *Hale* 161. 3 *Bl. Com.* 376. *Christian's note*.

4. In the case of inquisitions taken in the country, it has been the uniform practice in England (conformably to the ancient mode of summoning a jury from the vicinage or hundred) to return 24: for, as *Lord Hale* says, 'though only twelve are sworn, yet twenty-four are to be returned, to supply the defects or want of appearance of those that are challenged off, or make default.' 2 *Hale's Hist. Com. Law* 137.

5. The number of the petit jury has been long fixed at *twelve*. (See the quaint reason given by *Lord Coke*. *Co. Lit.* 155, a.) But this has not been uniformly the case in Virginia; for in 1630, we find that *Doctor Pott*, late governor, was tried for, and found guilty of stealing cattle, by thirteen jurors; and in the same year another person convicted of petit treason by fourteen jurors. See 1 *vol. Stat. large*, 145, 146.

## IV. OF THE CHALLENGE OF JURORS.

*And herein, I. Of the several kinds of challenge. II. When the challenge is to be taken. III. How the challenge shall be tried.*

## I. OF THE SEVERAL KINDS OF CHALLENGE.

There are two kinds of challenge, either to the *array*, by which is meant the whole jury as it stands *arrayed* in the *panel*, or little square *pane* of paper, on which the jurors names are written ; or to the *polls*, by which are meant the several particular persons or *heads* in the *array*. 1 *Inst.* 156, 158.

1. Challenge to the *array*, is in respect of the partiality or default of the sheriff, coroner or other officer that made the return ; and this is twofold.

(1) Principal challenge to the array ; which, if it is made good, is a sufficient cause of exception, without leaving any thing to the judgment of the triers.

Causes of challenge of this sort are such as these : If the sheriff or other officer be of kindred or affinity to the plaintiff or defendant, if the affinity continue. If any one or more of the jury be returned at the denomination of the party, plaintiff or defendant, the whole array shall be quashed. If the plaintiff or defendant have an action of battery against the sheriff, or the sheriff against either party, this is a good cause of challenge. So if the plaintiff or defendant have an action of debt against the sheriff ; but otherwise it is, if the sheriff have an action of debt against either party. Or if the sheriff have a parcel of the land depending upon the same title. Or if the sheriff or his under sheriff who returned the jury, be under the distress of either party. Or if the sheriff or his under sheriff, be either of counsel, attorney, officer, or servant of either party ; or arbitrator in the same matter, and treated thereof. 1 *Inst.* 156.

And the citizen may challenge the array against the commonwealth ; as in traverse of an office, he that traverseth may challenge the array. And so it is in case of life. 1 *Inst.* 156.

And where a citizen may challenge the array, for unindifferency, there the commonwealth, being a party, may also challenge for the same cause. 1 *Inst.* 156.

The array challenged on both sides shall be quashed. 1 *Inst.* 156.

(2.) Challenge to the array, for favour. He that taketh this must shew in certain the name of him that made it, and in whose time, and all in certainty. This kind of challenge, being no principal challenge, must be left to the discretion and conscience of the triers. As if the plaintiff or defendant be tenant to the sheriff, this is no principal challenge, but he may challenge for favour, and leave it to trial. So affinity between the son of the sheriff, and the daughter of the party, or the like, is no principal challenge, but to the favour ; but if the sheriff marry the daughter of either party, or the like, this (as hath been said) is a principal challenge. 1 *Inst.* 156. 2 *Hawk.* 419.

The commonwealth may challenge the array for favour. 1 *Inst.* 156.

2. Challenge to the polls is threefold.

(1.) *Peremptory*. This is so called, because a person may chal-

ledge peremptorily, upon his own dislike, without shewing of any cause.

But challenges for the commonwealth shall not be peremptory, but the prosecutor for the commonwealth shall assign a certain cause, which shall be judged of by the court. 1 *Rev. Code*, p. 103, sect. 7.

And this peremptory challenge is not allowable to the party against the commonwealth, except only in cases of treason or felony, in favour of life. 1 *Inst.* 156.

By the common law, a person for treason or felony might peremptorily challenge thirty-five. (1 *Inst.* 156.) But in Virginia, the number is restrained to twenty-four in treason, and twenty in murder or felony. 1 *Rev. Code*, p. 103, sect. 7.

And if a person stand mute on his arraignment, or persist, after being admonished by the court, in not answering to the indictment, or in peremptorily challenging above the number of jurors which by law he may be allowed to challenge peremptorily, or shall be outlawed, he shall be considered as convicted, and receive the same judgment, &c as on verdict or confession. 1 *Rev. Code*, p. 104, sect. 18.

(2.) Principal challenge to the polls; where cause is shewn, but which, if found true, stands sufficient of itself, without leaving any thing to the triers.

Causes of principal challenge to the polls are such as these:

Want of freehold is a good cause of challenge. 1 *Inst.* 156.

Also, if a person is an alien. 1 *Inst.* 156.

If the juror be of the blood or kindred of either party, this is a principal challenge; for that the law presumeth that one kinsman doth favour another, before a stranger; and how far remote soever he is of kindred, yet the challenge is good. 1 *Inst.* 157.

Affinity or alliance by marriage is a principal challenge, if the same continues, or issue be had; otherwise it is but to the favour. 1 *Inst.* 157.

If the juror be godfather to the child of the plaintiff or defendant, or they to his child, this is allowed to be a good challenge in our books. 1 *Inst.* 157.

If the juror have part of the land that dependeth upon the same title, it is a principal challenge. 1 *Inst.* 157.

It hath been allowed a good cause of challenge, on the part of the prisoner, that the juror hath declared his opinion beforehand, that the party is guilty, or will be hanged, or the like. 2 *Haw.* 418.

Likewise if the juror gave a verdict before, for the same cause, or upon the same title or matter, though between other persons. 1 *Inst.* 157.

So, likewise, one may be challenged, that he was indictor of the plaintiff or defendant in the same cause; for such a one, it may be thought, will not falsify his former oath. (*Lamb.* 554.) And if a grand-juryman, who was one of the indictors of the same cause, be returned upon the petit jury, and do not challenge himself, he shall be fined. 2 *H. H.* 309.

If a juror hath been an arbitrator, chosen by the plaintiff or defendant in the same cause, and hath been informed thereof, or treated of the matter, this is a principal challenge; otherwise, if he were chosen indifferently by either of the parties. 1 *Inst.* 157.



If he be of counsel, servant, or of fee, of either party, it is a principal challenge. *Ibid.*

Also if a jurymen, before he be sworn, take information of the case, this is cause of challenge. 2 *H. H.* 306.

If any, after he be returned, do eat or drink at the charge of either party, it is a principal cause of challenge. 1 *Inst.* 157.

But it is not a principal challenge to a juror, but only to the favour, that the prosecutor was lately entertained at his house. 3 *Salk.* 81.

Actions brought either by the juror against either of the parties, or by either of the parties against him, which imply malice or displeasure, are causes of principal challenge; other actions, which do not imply malice or displeasure, are but to the favour. 1 *Inst.* 157.

If either party do labour the juror, and give him any thing to give his verdict, this is a principal challenge; but if either party labour the juror to appear, and to do his conscience, this is no challenge at all, but lawful for him to do it. *Ibid.*

That the juror is a fellow servant with either party is no principal challenge, but to the favour. *Ibid.*

If the juror be attainted, or convicted of treason or felony, or for any offence to life or member, or in attain for a false verdict, or for perjury as a witness, or in a conspiracy, at the suit of the commonwealth, or in any suit (either for the commonwealth or for any citizen) be adjudged to the pillory, tumbrel, or the like, or to be branded or stigmatized, or to have any other corporal punishment, whereby he becometh infamous; these and the like are principal causes of challenge. *Ibid.* 158.

So it is if a man be outlawed in trespass, debt, or any other action, for he is *ex lex*, and therefore not a lawful man. *Ibid.*

3. Challenge to the polls for favour. This is, when either party cannot take any principal challenge, but sheweth causes of favour, which must be left to the conscience and discretion of the triers, upon hearing their evidence, to find him favourable or not favourable. And the causes of favour are infinite. For all which the rule of law is, that he must stand *indifferent*, as he stands unsworn. *Ibid.* 157.

## II. WHEN THE CHALLENGE IS TO BE TAKEN.

1. No challenge is to be taken either to the array, or to the polls, till a full jury have appeared. 2 *Haw.* 412.

2. He that hath divers challenges, must take them all at once. 1 *Inst.* 158.

3. If a juror be challenged by one party, and after be tried indifferent, it is time enough for the other party to challenge him. *Ibid.*

4. After challenge to the array, and trial duly returned, if the same party take a challenge to the polls, he must shew cause presently. *Ibid.*

5. If a juror be formerly sworn, if he be challenged, the party must shew cause presently, and that cause must rise since he was sworn. *Ibid.*

6. When the commonwealth is party, the defendant that challengeth for cause must shew his cause presently. *Ibid.*

7. But if a juror be challenged between party and party, and there be enough of the pannel besides; the cause of challenge needeth not to be shewed, unless the other side challenges *toute peravail*. Tr. p. *lais*, 143.

8. If a man, in case of treason or felony, challenge for cause, and he be tried indifferent, yet he may challenge him peremptorily. 1 *Inst.* 158.

9. The prisoner must take all peremptory challenges himself, even in cases wherein he may have counsel. 2 *Haw.* 413.

10. The challenge to the array must be in writing, but where the challenge is to the polls, it is a short way by a verbal challenge. Tr. p. *lais*, 172.

#### III. HOW THE CHALLENGES SHALL BE TRIED.

1. The challenge of him who first challenged shall be first tried. Tr. p. *lais*, 144.

2. If the array be challenged, it lies in the discretion of the court how it shall be tried; sometimes it is done by two coroners, and sometimes by two of the jury, with this difference, that if the challenge be for kindred in the sheriff, it is most fit to be tried by two of the jurors returned; if the challenge found in favour of partiality, then by any other two, assigned thereunto by the court. 2 *H. H.* 275.

3. When any challenge is made to the polls, if it be before any jurors are sworn, the court shall choose the triers; if two are sworn they shall try; and if they try one indifferent, and he be sworn, then he and the two triers shall try another; and if another be tried indifferent, and he be sworn, then the two triers cease, and the two that be sworn on the jury shall try the rest. If the plaintiff challenge ten, and the defendant one, and the twelfth is sworn, because one cannot try alone, then shall be added to him one challenged by the plaintiff, and another by the defendant. *Finch.* 112. 1 *Inst.* 158.

4. The triers oath is, *You shall well and truly try, whether A B (the jurymen challenged) stand indifferent between the parties to this issue; so help you God.* 1 *Salk.* 152.

5. If the cause of challenge touch the dishonour or discredit of the juror, he shall not be examined on his oath; but in other cases, he shall be examined on his oath, to inform the triers. 1 *Inst.* 158. 1 *Salk.* 153.

6. If the array be quashed against the sheriff, the process of *venire facias juratores* shall be directed to the coroners: if against any of the coroners, then process shall be awarded to the rest; if against all of them, then the court shall appoint certain elisors (so named *ab eligendo*) against whose return no challenge shall be taken to the array, because they were appointed by the court, but he may have his challenge to the polls. 1 *Inst.* 158.

#### V. OF THE DEMEANOR OF JURORS GIVING IN THEIR VERDICT.

1. By the common law, the jury, after hearing the evidence, ought to be kept together in some convenient place, without meat or drink,

fire or candle, and without speech with any, unless it be the sheriff, and with him only except they be agreed. 1 *Inst.* 227.

2. "No sheriff shall converse with a juror but by order of court, after the jury have retired from the bar." 1 *Rev. Code*, p. 101. sect. 16.

3. And if the jury, after their evidence given to them at the bar, do at their own charges eat or drink, either before or after they be agreed on their verdict, it is fineable, but it shall not avoid the verdict; but if before they be agreed on their verdict, they eat or drink at the charge of the plaintiff, if the verdict be given for him, it shall avoid the verdict, but if it be given for the defendant, it shall not avoid it, and so on the contrary. But if after they be agreed on their verdict, they eat or drink at the charge of him for whom they do pass, it shall not avoid the verdict. (1 *Inst.* 227.) But see 4 *H. & M.* 1. *Coleman &c. v. Moody.*

4. But with the assent of the justices they may both eat and drink; as if any of the jurors fall sick before they be agreed on their verdict, then by the assent of the justices he may have meat and drink, and also such other things as be necessary for him and his fellows also, at their own costs, or at the indifferent costs of the parties, if they so agree; and if they cannot agree, the justices may in such case suffer the jury to have both meat and drink for a time, to see whether they will agree. *Dr. & St.* 158.

5. After their departure they may desire to hear one of the witnesses again, and it shall be granted, so he deliver his testimony in open court: and also they may desire to propound questions to the court for their satisfaction, and it shall be granted, so it be in open court. 2 *H. H.* 296.

6. But if the plaintiff, after evidence given, and the jury departed from the bar, or any for him, do deliver any letter from the plaintiff to any of the jury concerning the matter in issue, or any evidence, or any writing touching the matter in issue, which was not given in evidence, it shall avoid the verdict, if found for the plaintiff, but not, if it be found for the defendant, and so on the contrary. But if the jury carry away any writing unsealed, which was given in evidence in open court, this shall not avoid their verdict, albeit they should not have carried it with them. 1 *Inst.* 227.

7. A jury sworn and charged in a capital case cannot be discharged (without the prisoner's consent) till they have given a verdict. 2 *Haw.* 439. *Fost.* 22.

8. If a jury say they are agreed, and it being asked who shall say for them, they say their foreman, but upon further inquiry they are not agreed, they may be fined. 2 *H. H.* 309.

9. If a jury cast lots for their verdict, it shall be set aside, and they shall be fined for their contempt. 3 *Keb.* 805. 2 *Lev.* 140, 205. 2 *Jones* 83.

10. But the court will refuse to hear the affidavits of any of the jurors themselves, to establish the fact of such conduct. 1 *Term Rep.* 11.

The jury having sat up all night, agreed in the morning to put two papers into a hat, marked plaintiff and defendant, and so drew lots; plaintiff came out, and they found for the plaintiff, which happened

to be according to the evidence, and the opinion of the judge. Upon motion for a new trial, it was agreed that the verdict be set aside; but the question was, whether the defendant should pay costs; the court inclined to give the plaintiff costs, comparing it to the case of a verdict against evidence; but at last it was agreed, that the costs should wait the event of a trial. *Str.* 642.

11. The jury may give a verdict without testimony, when they themselves have cognizance of the fact. *Tr. p. fairs* 179: 1 *Ventr.* 97.

12. But if they give a verdict on their own knowledge, they ought to tell the court so: but they may be sworn as witnesses; and the fair way is to tell the court, before they are sworn, that they have evidence to give. (1 *Salk.* 405.) And this they are now bound to do. See 1 *Rev. Code*, p. 101, sect. 14.

For certainly it is of dangerous consequence, to receive a verdict against evidence given, on supposal that some of the jury knew otherwise, or on private information given by any jurymen to the rest, where he cannot be cross examined. *Tr. p. fairs* 209.

13. After they be agreed they may, in cases between party and party, if the court be risen, give a private verdict, before any of the judges of the court; and then they may eat and drink; and the next morning, in open court, they may either affirm or alter their private verdict; and that which is given in court shall stand. 1 *Inst.* 227.

But in criminal cases of life or member, the jury can give no private verdict, but they must give it openly in court. *Ibid.*

14. In all causes, and in all actions, the jury may give either a general or special verdict, as well in causes criminal as civil, and the court ought to receive a special verdict, if pertinent to the point in issue. 3 *Salk.* 373.

Thus if one be indicted for grand larceny, that is, for stealing goods above the value of twelve pence, yet the jury may find specially, that he is guilty, but that the goods are not above the value of twelve pence. In which case he shall only have judgment of petit larceny. 1 *Saw.* 95.

15. Jurors are to try the *fact*, and the judges ought to judge according to the *law* that ariseth upon the fact. 1 *Inst.* 226.

But if they will take upon them the knowledge of the law upon the matter; they may, yet it is dangerous, for if they mistake the law, they run into the danger of an attain; therefore to find the special matter is the safest way, where the case is doubtful. *Ibid.* 228.

But if the jury find according to the direction of the judge, in matter of law, although the judge be mistaken, yet the jury shall not be liable to attain. *L. Raym.* 470.

But the *sufficiency* of the evidence must be left *wholly* to the consideration of the jury. 1 *H. & M.* 564.

16. It hath been adjudged, that if the jury acquit a prisoner of an indictment of felony against manifest evidence, the court may, before the verdict is recorded, but not after, order them to go out again, and re-consider the matter; but this by many is thought hard, and seems not of late years to have been so frequently practised as formerly. However, it is settled, that the court cannot set aside a verdict which acquits a defendant of a prosecution properly criminal, as it seems that

they may a verdict that convicts him for having been given contrary to evidence and the direction of the judge, or any verdict whatsoever for a mistrial. 2 *Haw.* 442.

17. After the verdict recorded, the jury cannot vary from it; but before it be recorded, they may vary from the first offer of their verdict, and that verdict which is recorded shall stand. 1 *Inst.* 227.

18. A verdict finding an impossible matter shall not be void, if at the same time it find the substance of the indictment; but the surplus shall be rejected. 1 *Haw.* 77.

19. Verdicts shall not be taken so strictly as pleadings; but the substance of the thing in issue ought to be always found. 3 *Salk.* 373.

20. It is said, that if the jurors agree not, before the departure of the justices of jail delivery into another county, the sheriff must send them along in carts, and the judge may take and record their verdict in a foreign county. 2 *H. H.* 297. *Tr. p. pais* 274, 285. 1 *Vent.* 97.

But if the case so happen, that the jury can in no wise agree, as if one of the jurors knoweth in his own conscience the thing to be false, which the other jurors affirm to be true, and so he will not agree with them in giving a false verdict, and this appeareth to the justices by examination; the justices (as it seemeth) in such case may take such order in the matter, as shall seem to them by their discretion to stand with reason and conscience, by awarding a new inquest, or otherwise, as they shall think best by their discretion, like as they may do, if one of the jury die before the verdict. *Dr. & Stud.* 158.

## VI. OF THE INDEMNITY AND PUNISHMENT OF JURORS.

1. If a man assault, or threaten a juror, for giving a verdict against him, he is highly punishable by fine and imprisonment; and if he strikes him in the court, in the presence of the judge of assize, he shall lose his hand and his goods, and profits of his lands during life, and suffer perpetual imprisonment. 1 *Haw.* 57, 58.

2. Where more than one of the persons returned upon a jury do appear, but not a sufficient number to take an inquest, and some of the others come within view of the court, or into the same town in which the court is holden, but refuse to come into the court to be sworn; upon proof of such matter, the court may, at the prayer of the parties, order the jurors who appeared to inquire what is the yearly value of such defaulter's lands, and after such inquiry made, either summon them to appear, on pain of forfeiting such sums as their lands have been found to be worth by the year, or some lesser sum, or impose a fine of the like sum upon them, without any farther proceeding. But it seems, that such juror shall be liable to lose his issues only for such default, and not the yearly value of his lands, unless the party pray it. But a juror who hath actually appeared, and after makes default, is said to be subject to such forfeiture of the yearly value of his lands, whether the party pray it or not; because his contempt appears to the court by its own record; yet even in this case, the court in discretion will sometimes only impose a small fine. Also, it seems that a juror who makes default, without ever coming into the town wherein

the court is holden, is liable only to lose his issues, or to be amerced, but not to be fined. 2 *Haw.* 146.

3. "Any juror guilty of a contempt to the court may be fined by such court in any sum not exceeding thirty dollars." 1 *Rev. Code*, p. 101, sect. 15.

4. If the grand jury at the assizes or sessions will not find a bill, the court may impanel another inquest (by the 3 *H. 7. c. 1.*) to inquire of their concealments, and thereupon set fines upon them. But it seemeth that fines set upon grand inquests in any other manner are not warrantable by law; for the privilege of a citizen of the commonwealth is, that his life shall not be drawn in danger without due presentment or indictment, and this would be but a slender screen or safe guard, if every justice of the peace, or judge of assize, may make the grand jury present what he pleases, or otherwise fine them. (2 *H. H.* 160, 1.) But the above statute is not now in force in this country. See 1 *Rev. Code*, p. 291.

5. It seems to be certain, that no one is liable to any prosecution whatsoever, in respect of any verdict given by him in a *criminal* matter, either upon a grand or petit jury; for, since the safety of the innocent, and punishment of the guilty, doth so much depend upon the fair and upright proceedings of jurors, it is of the utmost consequence, that they should be as little as possible under the influence of any passion whatsoever. And therefore, lest they should be biassed with the fear of being harassed by a vexatious suit, for acting according to their conscience, the law will not leave any possibility for a prosecution of this kind. And as to the objection, that an attaint lie against a jury for a false verdict in a civil cause, and that there is as much reason to allow of it in a criminal one; it may be answered, that in an attaint in a civil cause, a man's property is only brought into question a second time, and not his liberty or life. 1 *Haw.* 191. *L. Raym.* 469.

6. But where the jurors give a false verdict upon an issue joined in any court of record, and judgment thereupon, the party grieved may bring his writ of attaint. Upon which twenty-four of the best men of the county are to be jurors, who are to hear the same evidence which was given to the petit jury, and as much as can be brought in affirmation of the verdict, but no other against it. And if these twenty-four who are called the grand jury find it a false verdict, then followeth this terrible judgment at the common law upon the petit jury; that the party shall be infamous, so as never to be received to be a witness, or a juror; shall forfeit his goods and chattels; and his lands and tenements shall be taken into the commonwealth's hands, his wife and children cast out of doors; his houses prostrated; his trees rooted up; his meadows ploughed up; and his body imprisoned. And seeing all trials of real, personal, and mixt actions depend upon the oaths of twelve men, prudent antiquity inflicted a severe and strange punishment upon them, if they were attained of perjury. 1 *Inst.* 294. *Read. Jur.*

But this proceeding seems to be entirely disused at this day, and in the place of attaint, motions are now usually made for new trials, when a verdict is against evidence. *Wood b. c. 4.*

7. It seems to be the current opinion of the old books, that jurors

are not subject to any prosecution for a false verdict, except by way of attain; and there seems to be very few ancient precedents for the punishment, either for grand or petit juries, merely for giving a verdict against evidence, or the direction of the court, either in a capital or civil matter. 2 *Haw.* 147.

And in *Bushel's case*, it was resolved by all the judges, upon a full conference together, that a jury is not fineable for going against their evidence, where an attain lies. And where an attain doth not lie. *L. Vaughan* says thus: "That the court could not fine a jurymen at the common law, where attain did not lie, I think it to be the clearest position that I ever considered, either for authority or reason of law." And one reason for this is, because the judge cannot fully know upon what evidence the jury give their verdict; for they may have other evidence, than what is shewed in court; they are of the vicinage, the judge is a stranger; they may have evidence from their own personal knowledge that the witnesses speak false, which the judge knows not of; they may know the witnesses to be stigmatized and infamous, which may be unknown to the parties or court. And if the jury knew no more than what they heard in court, and so the judge knew as much as they, yet they might make different conclusions, as often times two judges do; and therefore, as it would be a strange and absurd thing to punish the judge for differing with another in opinion or judgment, so it would be worse for the jury, who are judges of the fact, to be punished for finding against the direction of him who is not judge of the fact. *Tr. per pais* 224. *Vaugh.* 135.

And to say the truth, says lord *Hale*, it would be the most unhappy case that could be to the judge, if he at his peril must take upon him the guilt or innocence of the prisoner; and if the judge's opinion must rule the matter of fact, the trial by jury would be useless. 2 *H. H.* 315.

But what if a jury gave a verdict against all reason, convicting or acquitting a person indicted of felony, what shall be done? If the jury convict a man, against or without evidence, and against the direction of the court, the court may reprieve him before judgment, and acquaint the executive, and certify for his pardon; if the jury acquit him in like manner, the court may send them back again (and so in the former case) to consider better of it, before they record the verdict; but if they are peremptory in it, and stand to their verdict, the court must take their verdict and record it. 2 *H. H.* 309, 310.

(A) *Challenge to the array, because the sheriff is of kindred to one of the parties: from Coke's entries.*

And now at this day, to wit: — came the aforesaid A, the plaintiff, and B, the defendant, by their attornies, and the jurors were impanelled and demanded, and came, and thereupon the aforesaid B challengeth the array of the pannel aforesaid, because he said that that pannel was arrayed by one J Z, now and at the time of making the array aforesaid, sheriff of the said county of D, which said sheriff is a kinsman of the aforesaid J M (the plaintiff) to wit, the son of G Z, the son of J Z, the son of J Z, &c. (state the pedigree.) And this he is ready

to verify, whereupon he prayeth judgment, and that the said pannel may be quashed. Which said challenge by                      and by                      triers to this chosen and sworn is found true. And therefore let the pannel aforesaid be quashed and amoved, &c. *Tr. per pais* 160.

(B) *Challenge because the pannel was returned at the instance of the party.*

And upon this, the said                      challenges the array of the said pannel, because he says, that that pannel was arrayed by J S, late sheriff of the county of                      aforesaid, at the nomination of the said                      and in his favour; which said challenge, by triers thereof sworn, is found true.

For other forms of challenges, and proceedings thereupon, see *Tr. per pais* 159, 184.

## JUSTICES OF THE PEACE.

1. THE term '*Justices of the Peace*,' though familiar in England long before the settlement of Virginia, was not introduced into the laws of the colony until the year 1661. From the earliest period of our settlement (in 1607) to the year 1629, '*commanders of plantations*' are alone mentioned in our laws, as persons authorised to exercise civil jurisdiction. They also possessed the supreme military command of the settlement. (See 1 vol. *Hen. St. Large*, 125, 127.) A commission expressing their powers and jurisdiction, may be seen in the 1st vol. of the Statutes at Large, page 131. In the year 1629, '*commissioners of monthly courts*' were appointed by commission from the governor, and had jurisdiction in civil cases and petty offences only. (See the form of the commission, 1 vol. *Stat. Large*, 132.) In 1632, similar commissions issued to different parts of the colony, styling the persons appointed '*commissioners*,' for the places to which they were assigned; and after specifying their jurisdiction, in matters civil and criminal, they were moreover empowered 'to do and execute whatever a *justice of the peace* or two or more *justices of the peace* might do,' according to the laws of England. (See 1 vol. *Stat. Large*, 168, 9.) The term '*commissioners*' was, however, generally used in our ancient statutes, till by degrees that of '*Justices of the Peace*' was adopted. See *Stat. at Large passim*, from 1629 to 1665, act 1.

2. By the fifteenth article of the constitution of Virginia, 'The governor, with the advice of the privy council, shall appoint justices of the peace for the counties; and in case of vacancies, or a necessity of



increasing the number hereafter, such appointments to be made upon the recommendation of the respective county courts.'

3. The judges of the supreme courts, as well as the justices of the peace, are expressly declared by statute, to be conservators of the peace. 1 *Rev. Code*, p. 94.

4. So, every court of record hath power to keep the peace within its own precinct. *Haw. B. 2. c. 8, sect. 3.*

5. Also, every sheriff is a principal conservator of the peace. *Ibid.* sect. 4.

\* 9. Also, every coroner is another principal conservator of the peace. *Ibid.* sect. 5.

7. Also, Every *high* and *petit* constable are, by the common law, principal conservators of the peace. *Ibid.* sect. 6.

8. The general duty of the conservators of the peace, by the common law, is to employ their own and to command the help of others, to arrest and pacify all such, who in their presence, and within their jurisdiction and limits, shall go about to break the peace. *Dalt. c. 1.*

And if a conservator of the peace, being required to see the peace kept, shall be negligent therein, he may be indicted and fined. *Ibid.*

9. Whatsoever any one justice may do, the same also may lawfully be done by any two or more justices; but where the law giveth authority to two, there one alone cannot execute it. *Dalt. c. 6.*

10. And yet where a statute appoints a thing to be done by two justices or more, if it be any misdemeanor or matter against the peace, it seems that one of them may issue his warrant to apprehend the offender, and to bring him before the justices so appointed. *Dalt. c. 6.*

11. But where a thing is appointed by statute to be done before one person certain, such thing cannot be done by or before any other; for by such express designation of one, all others are excluded, and their proceedings therein are *coram non iudice*. *Dalt. c. 6.*

12. Justices of the peace have no *coercive* power out of the county; and therefore an order of bastardy, or an order for payment of labourers wages, made by them out of the county is not binding; yet *recognizances* and *informations* voluntarily taken before them in any place are good. *Haw. B. 2. c. 8. sect. 44, 7th edit.*

13. A justice of the peace may do a ministerial act out of his county, as examining a party robbed whether he knows the felons; but he cannot do a compulsory act, as committing a person for not giving a recognizance. 2 *Hale* 50, 51.

14. Regularly, justices of the peace ought not to execute their office in their own case; but cause the offenders to be convened or carried before some other justice, or desire the aid of some other justice, being present. *Dalt. c. 173. 1 Salk. 396. 2 Salk. 607.*

15. Yet in some cases, if the justice shall act in his own cause, it seemeth to be justifiable; as when a justice shall be assaulted, or (in the doing of his office especially) shall be abused to his face, and no other justice present with him; then it seems he may commit such offender until he shall find sureties for the peace or good behaviour, as the case shall require. But if any other justice be present, it were fitting to require his aid. *Dalt. c. 173. Str. 420, 421.*

And lord Coke says, 'it is not safe for any man (be he never so learned) to be of counsel with himself in his own cause, but to take the

advice of other great and learned men ; for that men are generally more foolish in their own concerns, than in those of other people.' *Co. Lit.* 377. b.

16. If a justice exceed his authority in granting a warrant, yet the officer must execute it, and is indemnified for so doing ; but if it be a case wherein he hath no jurisdiction, or in a matter whereof he hath no cognizance, the officer ought not to execute such warrant ; so that the officer is bound to take notice of the authority and jurisdiction of the justice. 10 *Co.* 76. *Cro. Car.* 394.

Thus if a justice send a warrant to a constable to take up one for slander, or the like, the justice hath no jurisdiction in such cases, and the constable ought to refuse the execution of it. *Wood*, B. 1. c. 7.

17. Justices of the peace may supersede their own order, when it hath issued under a surprise or mistake. *Str.* 6.

18. Where a statute gives power to the justices of the peace, to hear and determine an offence in a *summary* way, it is necessarily implied and supposed, as a part of natural justice, that the party be first cited, and have an opportunity to be heard and answer for himself. And if a justice proceed against a party without *summoning* him, it would be a misdemeanor, for which an information would lie. 1 *Haw.* 154. 1 *Salk.* 181. *L. Raym.* 1407. *Str.* 678.

19. But before an information is granted, the court will first require that the conviction be removed before them. *Str.* 915. See also, *Str.* 1088, 530, 413.

20. Where a special authority is given to justices out of sessions, it ought to appear in their orders, that that authority was exactly pursued. 2 *Salk.* 475.

21. In all cases where justices may hear and determine out of sessions (viz. on their own view, or confession, or oath of witnesses) the justices ought to make a record in writing under their hands, of all matters and proof ; which record, notwithstanding they may, in many cases, keep by them. *Dalt.* c. 115.

22. ☞ But since most of the business of justices of the peace (out of sessions) consisteth in the execution of divers statutes committed to their charge, which statutes cannot be sufficiently abridged, but that they will come short of the substance and body thereof ; therefore it will be safest for the justice of the peace not to rely over much upon these short collections thereof, but to have an eye to the *Statutes at Large*, and thereby to take their further and better directions for their whole proceedings. For (as lord Coke observes) 'abridgements are of good and necessary use to serve as tables, but not to ground any opinion, much less to proceed judicially upon them.' '*Ideo, tutius est petere fontes quam sectari rivulos.*' *Dalt.* c. 173. 10 *Co.* 117 b.

23. A justice of the peace is strongly protected by the law, in the just execution of his office. Thus he is not to be slandered or abused ; and the words, '*you are a rascal, a villain, and a liar,*' spoken of a justice in the execution of his office, were held actionable. (*Str.* 617. *L. Raym.* 1396.) So, to say of a justice in the execution of his office, '*Mr. — is a rogue.*' *Str.* 1168.

24. So, a person may be indicted for saying to a justice, in the execution of his office, '*you are a rogue, and a liar.*' And by the court. The justice may make himself judge, and punish immediately ; but if

he thinks proper to proceed less summarily by way of indictment, he may. The true distinction is, that where the words are spoken in the presence of the justice, there he may commit; but where it is behind his back, the party can be only indicted for a breach of the peace. *Str.* 420.

24. But an information was held not to lie for speaking of a justice in relation to what he had done, if not spoken in the execution of his office. See 2 *Str.* 1157.

25. A justice of the peace is not punishable at the suit of the party, but only at the suit of the commonwealth, for what he doth as judge; in matters which he hath power by law to hear and determine without the concurrence of any other; *for regularly no man is liable to an action for what he doth as judge.* But in cases where he proceeds ministerially, rather than judicially, if he acts corruptly, he is liable to an action at the suit of the party, as well as to an information at the suit of the commonwealth. (2 *Haw.* 85.) And more explicitly, it was said by lord *Mansfield*, that the court has no power or claim to review the reasons of justices of the peace, upon which they found their judgments, in matters confided to their discretion. 'But if it clearly appears, that the justices have been *partially, maliciously, or corruptly* influenced in the exercise of this discretion, and have consequently abused the trust reposed in them, they are liable to prosecution by indictment, or information, or even, possibly, by action, if the malice be very gross and injurious. If their judgment is wrong, yet their heart and intention pure, God forbid that they should be punished.' He declared that he should always lean towards favouring them; unless partiality, corruption, or malice, clearly appear. All the other judges concurred in the same general principle, that a justice was not punishable for a mere error in judgment. *Burr.* 556. See also, *Burr.* 785. 1162. 8. P.

26. But a justice of the peace, where punishable at all, shall not be liable to be punished both ways; that is, both *criminally* and *civilly*; for, before the court will grant an information, they will require the party to relinquish the civil action, if any such is commenced. And even in the case of an indictment, and though the indictment be actually found yet the attorney for the commonwealth (on application made to him) will grant a *noli prosequi* upon such indictment, if it appear to him that the prosecutor is determined to carry on a civil action at the same time. *Burr.* 719.

27. If a justice will not, on complaint made to him, execute his office, or shall misbehave in his office, an information may be moved for against him, and he may be put out of the commission. (*Cromb.* 7. 2 *Ath.* 2.) But the most usual way of compelling them to execute their office in any case, is by writ of *mandamus*.

28. Where a justice commences an assault, it may be repelled, and justified; for he forfeits his protection by beginning a breach of the peace himself. *Ca. temp. Hard.* 240.

28. A justice has a right to judge for himself, whether the offence charged be an offence within the law; and if upon hearing the charge opened, he thinks it not to be an offence within the law, he ought not to proceed upon it. 2 *Burr.* 788.

JUSTIFIABLE HOMICIDE, see HOMICIDE.

LANDLORD and TENANTS, see RENTS.

## LARCENY.

1. LARCENY, or *theft*, by contraction for *latrocinium*, *latrocentium*, is distinguished by the law into two sorts; the one called *simple* larceny, or plain theft unaccompanied with any other atrocious circumstance; and *mixed* or *compound* larceny, which also includes in it the aggravation of a taking from one's house or person. 4 *Bl. Com.* 229.

2. *Simple* larceny is also generally divided into two kinds; *grand* larceny, when the thing stolen exceeds the value of twelve pence, and *petit* larceny, when it is of that value or under. 4 *Bl. Com.* 229.

3. Before the adoption of the penitentiary system, the benefit of clergy was allowed in all cases of simple larceny (except horse-stealing) which would otherwise be without clergy, whether the same be newly created by any act of Assembly, or exist under the common law, unless it be taken away by the express words of some act of Assembly. See title 'CLERGY,' [*benefit of.*]

*I. Grand Larceny. II. Petit Larceny. III. Larceny from the person. IV. Larceny from the house.*

### I. GRAND LARCENY.

Grand Larceny is, a felonious and fraudulent taking and carrying away, by any person, of the mere personal goods of another, above the value of twelve pence. 1 *Haw.* 89.

*Felonious and fraudulent...* Felony is always accompanied with an evil intention, and therefore should not be imputed to a mere mistake or misanimadversion; as where persons break open a door, in order to execute a warrant, which will not justify such a proceeding; for in such case there is no felonious intention. 1 *Haw.* 65.

For it is the mind that makes the taking of another's goods to be felony, or a bare trespass only; but because the variety of circumstances is so great, and the complications thereof so mingled, that it is impossible to prescribe all the circumstances evidencing a felonious intent, or the contrary; the same must be left to the due and attentive consideration of the judge and jury, wherein the best rule is, in doubtful matters, rather to incline to acquittal than conviction. Only in general it may be observed, that the ordinary discovery of a felonious intent is, if the party doth it secretly, or being charged with the goods, denies it. 1 *H. H.* 509.

But, nevertheless, doing it openly and avowedly doth not excuse

from felony. So where a man came to *Smithfield* market to sell a horse, and a jockey coming thither to buy a horse, the owner delivered his horse to the jockey to ride up and down the market, to try his paces, but instead of that, the jockey rode away with the horse, this was adjudged felony. *Kel.* 82.

So where a person came into a sempstress's shop, and cheapened goods, and ran away with the goods out of the shop, openly in her sight, this was adjudged to be felony. *Raym.* 276.

So where a man comes into a house, by colour of a writ of execution, and carries away the goods; or sues out a replevin to get another man's horse, and then runs away with him; that is felony under colour of law. 2 *Ventr.* 94. *Kel.* 83.

*Taking*.....All felony includes trespass, and every indictment must have the words *feloniously took*, as well as *carried away*; from whence it follows, that if the party be guilty of no trespass in taking the goods, he cannot be guilty of felony in carrying them away. 1 *Haw.* 89.

And from this ground it hath been holden, that one who finds the goods which I have lost, and converts them to his own use, with intent to steal them, is no felon, and *a fortiori* therefore it must follow, that one who has the actual possession of my goods by my delivery, for a special purpose, as a carrier who receives them in order to carry them to a certain place; or a taylor who has them in order to make me a suit of clothes; or a friend who is intrusted to keep them for my use; cannot be said to steal them, by embezzling them afterwards. 1 *Haw.* 89.

But yet it hath been resolved, that if a carrier opens a pack, and takes out part of the goods; or a weaver who has received silk to work, or a miller who has corn to grind, take out part thereof, with intent to steal it, it is felony. 1 *Haw.* 90.

So, where a man's goods are in such a place, where ordinarily they are or may be lawfully placed, and a person take them, with intent to steal them, it is felony, and the pretence of finding must not excuse. 1 *H. H.* 506.

So, if a man's horse be going upon a common where he has a right to put him, and another take the horse, with intent to steal him, it is no finding, but a felony. 1 *H. H.* 506.

So also, if the horse stray into a neighbour's ground or common, it is felony in him that so takes him. But if the owner of the ground takes him doing damage, or seize him as a stray, though perchance he hath no title so to do, yet there is not a felonious intention, and therefore cannot be felony. 1 *H. H.* 506.

If one man's sheep stray into another man's flock; and that other person drives it along with his flock, or by bare mistake shears it, this taking is not a felony; but if he knows it to be another's, and marks it with his mark, this is an evidence of felony. 1 *H. H.* 507.

*Lord Hale* says, If one man takes another man's hay or corn, and mingle it with his own heap or stack, or takes another man's cloth and embroider it with silk or gold; such other person may retake the whole heap of corn, or cock of hay, or garment, and embroidery also; and this retaking is no felony, nor so much as a trespass. 1 *H. H.* 513.

It seems generally agreed, that one who has the bare charge,

or the special use of goods, but not the possession of them ; as a shepherd who looks after my sheep, or a butler who takes care of my plate, or a servant who keeps a key of my chamber, or a guest who has a piece of plate set before him in an inn, may be guilty of felony, in fraudulently taking away the same. 1 *Haw.* 90. 4 *Bl. Com.* 231.

*And carrying away.....* To make it come within this description, it seemeth that any the least removing of the thing taken from the place where it was before is sufficient for this purpose, though it be not quite carried off ; and upon this ground, the guest who having taken off the sheets from his bed with an intent to steal them, carried them into the hall and was apprehended before he could get out of the house, was adjudged guilty of larceny. So also was he, who having taken an horse in a close, with an intent to steal him, was apprehended before he could get him out of the close. 1 *Haw.* 93.

*By any person.....* A wife may be guilty thereof, by stealing the goods of a stranger : but not by stealing the goods of her husband. 1 *Haw.* 93.

It is said by *Mr. Dalton* and others, that it is no felony for one reduced to extreme necessity to take so much of another's victuals as will save him from starving ; but lord *Hale* says, that this rule by the law of *England* is false ; and therefore, that if a person being under necessity for want of victuals or clothes, steals another man's goods, it is felony. 1 *H. H.* 54.

If one stealeth another man's goods, and afterwards another stealeth the same from him ; the owner may charge the first or second felon, at his choice. *Dalt. c.* 162.

An alien whose sovereign is in amity with the United States, residing here, and receiving the protection of the law, oweth a local allegiance to the government during the time of his residence, and if, during that time, he committeth an offence, he shall be liable to be punished for the same, even as a natural born citizen ; for his person and personal estate are as much under the protection of the law as the natural born citizen, and if he is injured in either, he hath the same remedy at law for such injury. *Fost.* 185.

So also, an alien whose sovereign is at enmity with us, living here under the commonwealth's protection, committing offences, may be proceeded against in like manner ; for he oweth a temporary local allegiance, founded on that share of protection he receiveth. *Ibid.*

So also a prisoner of war, although he is not properly subject to the municipal laws of this country, yet if he commits any offence against the law of nations, or the light of nature and the fundamental laws of all society, he is liable to answer in the ordinary course of justice, as other persons offending in like manner are. As in the case of *Peter Molieres*, a French prisoner, who was indicted at the jail delivery for the city of *Bristol*, in August, 1758, before *Sir Michael Foster*, for privately stealing, in the shop of a goldsmith and jeweller, a diamond ring, valued at twenty pounds. *Sir Michael* says, he thought it highly improper to proceed capitally, upon a local statute, against a prisoner of war ; and therefore advised the jury to acquit him of the circumstance of stealing in the shop, as by the statute, and to find him guilty of simple larceny to the value laid in the indictment. Accordingly he was burnt in the hand, and sent to the prison appointed for French prisoners. *Ibid.* 188.

*Of the mere personal goods....Mere*; for if the personal goods savour any thing of the reality it cannot be larceny. And therefore they ought to be no way annexed to the freehold; therefore it is no larceny, but a bare trespass, to steal corn or grass growing, or apples on a tree; but it is larceny to take them, being severed from the freehold, as wood cut, grass in cocks, stones digged out of the quarry; and this, whether they are severed by the owner, or even by the thief himself, if he sever them at one time, and then come again at another time and take them. 1 *Haw.* 93. 1 *H. H.* 516. 4 *Bl. Com.* 232.

Also, the goods ought to have some worth in themselves, and not to derive their whole value from the relation they bear to some other thing, which cannot be stolen; as paper or parchment, on which are written assurances concerning lands, or obligations, or covenants, or other securities for a debt, or other *choses* in action. 1 *Haw.* 93.

But "if any record, or parcel of the same, writ, return, pannel, process, or warrant of attorney, in any court within this commonwealth, be willingly stolen, taken away, withdrawn, or avoided by any clerk, or by any other person, because whereof any judgment shall be reversed, such stealer, taker away, withdrawer, or avoider, their procurers, counsellors and abettors, being thereof indicted, and duly convicted, by their own confession, or by inquest to be taken of lawful men, shall be judged for felons, and shall incur the pain of felony." 1 *Rev. Code*, p. 45.

☞ This being a clergyable offence, before the amendment of our penal code, is now punishable by confinement in the penitentiary, for a period not less than six months, nor more than two years. See 1 *Rev. Code*, p. 357, sect. 13. and CLERGY....BENEFIT OF.

And "he or she shall be adjudged a felon, and not have the benefit of clergy, who shall steal, or by other means take from the possession or custody of another, any warrant from the register of the land-office of this commonwealth, to authorise a survey of waste and unappropriated lands." 1 *Rev. Code*, p. 250, sect. 6.

Also, "he or she shall be adjudged a felon, and not have the benefit of clergy, who shall steal, or by robbery take from the possession or custody of another, any *loan-office certificate of the United States*, or any of them, or any *warrant of the governor* or other person exercising that function, or any *certificate of the auditor* for public accounts to the treasurer, authorising the payment of money, or shall *present, or cause to be presented*, such loan-office certificate at a loan office of the United States, or any of them, for the discharge of the whole, or any part thereof, or such warrant or auditor's certificate at the public treasury, for the payment thereof, knowing such loan-office certificate, or warrant, or auditor's certificate to have been stolen, or by robbery to have been taken from the possession or custody of another." 1 *Rev. Code*, p. 250, sect. 7.

☞ The two cases next above mentioned, not having been expressly enumerated, in the penitentiary law, they are, under the act of the twenty-first of January 1800, punishable by confinement, for a period not less than one nor more than ten years. See 1 *Rev. Code*, p. 412.

And "if any person shall steal or take by robbery from another, any bank or post note, then every such person, being duly thereof convicted, shall be sentenced to suffer imprisonment in the jail and

penitentiary house, for a period of time not less than *three* years, nor more than *ten* years." 2 *Rev. Code*, p. 118.

The goods ought also not to be things of a base nature, as dogs, cats, bears, foxes, monkeys, ferrets, and the like, which, howsoever they may be valued by the owner, shall never be so highly regarded by the law, that for their sakes a man shall die: but yet the stealing of an hawk, knowing it to be reclaimed, is felony by the common law, and by statute, in respect of that very high value which was formerly set upon that bird. 1 *Haw.* 93.

*Of another....* It seems agreed, that the taking of goods, whereof no one had a property at the time, cannot be felony; and therefore that he who takes any treasure trove, or a wreck, waif, or stray, before they have been seized by the persons who have a right thereto, is not guilty of felony, but shall be punished by fine. 1 *Haw.* 94.

A man may, under some circumstances, be guilty of stealing *his own goods*; as where he takes them from a pawn-broker, or any one to whom he has entrusted them, with intent to charge the bailee with the value. 4 *Bl. Com.* 231.

But yet the taking of these must be, where the party that takes them really believes them to be such, and colours not a felonious taking under such a pretence; for then every felon would cover his felony under that pretence. 1 *H. H.* 506.

Neither shall he who takes fish in a river, or other great water, wherein they are at their natural liberty, be guilty of felony; as he may be, who takes them out of a trunk or pond. 1 *Haw.* 94.

Upon the like ground it seems clear, that a man cannot commit felony, by taking hares or conies in a warren, or old pigeons being out of the house; but it is agreed, that one may commit larceny, by taking such or any other creatures *feræ nature*, if they be fit for food, and reduced to tameness, and known by him to be so. 1 *Haw.* 94. 4 *Bl. Com.* 236.

Also, it is said, that there may be felony in taking goods, the owner whereof is unknown; in which case the commonwealth shall have the goods, and the offender shall be indicted for taking the goods of a person unknown; and it seems, that in some cases the law will rather feign a property, where in strictness there is none, than suffer an offender to escape. 1 *Haw.* 94.

He who steals goods belonging to a parish church may be indicted for stealing the goods of the parishioners. *Ibid.*

And it hath been adjudged, that he who takes off a shroud from a dead corps, may be indicted as having stolen it from him, who was the owner thereof when it was put on; for a dead man can have no property. 1 *Haw.* 94. 4 *Bl. Com.* 237.

*Above the value of twelve pence....* The learned editor of *Hale's* history of the pleas of the crown observes, that in former times, though the punishment of theft was capital, yet the criminal was permitted to redeem his life by a pecuniary ransom; but in the 9 *H. 1.* it was enacted, that whosoever was convicted of theft should be hanged, and the liberty of redemption was entirely taken away; which law continues to this day, but considering the alteration in the value of money, the severity is much greater now than it was then, for twelve pence would then purchase as much as forty shillings will now. And yet a theft



above the value of twelve pence is still liable to the same punishment. Upon which sir *H. Spelman* justly observes, that while all things else have risen in their value, and grown dearer, the life of man is become much cheaper; and from thence takes occasion to wish, that the ancient tenderness of life were again restored. 1 *H. H.* 12.

And lord *Coke*, observing that when the statute of the 3 *Ed.* 1. was made, which makes stealing of goods above the value of twelve pence to be grand larceny, the ounce of silver was the value of twenty pence, and now it is of the value of five shillings and above, draws the conclusion, that the things stolen ought to be reasonably valued, that is, having respect to the great alteration in the value of money. (2 *Inst.* 189, 190.) For twenty shillings were then a real pound weight; which name we still retain, although the weight is much diminished.

If two persons or more, together, steal goods above the value of twelve pence, every one of them is guilty of grand larceny; for each person is as much an offender as if he had been alone. 1 *Haw.* 95.

Also, it seems the current opinion of all the old books, that if one at several times steal several parcels of goods, each under the value of twelve pence, but amounting in the whole to more, from the same person, and be found guilty thereof on the same indictment, he shall have judgment of death as for grand larceny; but this severity is seldom practised. *Ibid.*

"Every person convicted of simple larceny, to the value of four dollars and upwards, or as accessory thereto before the fact, shall restore the goods or chattels so stolen to the right owner or owners thereof, or shall pay to him, her, or them, the full value thereof, or so much thereof as shall not be restored; and moreover shall undergo a confinement in the penitentiary, for a period not less than one, nor more than three years." 1 *Rev. Code*, p. 356, sect. 6.

"*Robbery or larceny* of obligations or bonds, bills obligatory, bills of exchange, promissory notes for the payment of money, lottery tickets, paper bills of credit, certificates granted by or under the authority of this commonwealth, or of the United States, or any of them, shall be punished in the same manner as robbery or *larceny* of goods and chattels. *Ibid.* sect. 8.

## II. PETIT LARCENY.

Petit larceny agrees with grand larceny in several particulars above mentioned, except only the value of the goods (and except as hereafter followeth) so that where ever an offence would amount to grand larceny, if the things stolen were above the value of twelve pence, it is petit larceny, if it be but of that value or under. 1 *Haw.* 95.

And if one be indicted for stealing goods to the value of ten shillings, and the jury find specially, as they may, that he is guilty, but that the goods are worth but ten pence, he shall not have judgment of death, but only as for petit larceny. *Ibid.*

In petit larceny there can be no accessories, either before or after. 1 *H. H.* 530.

For a justice of the peace, before whom an offender shall be brought for petit larceny out of sessions, may not punish the said offender by his discretion, and so let him go; but must have him committed or

bailed, to the intent he may come to his trial, as in cases of other felonies: and if, upon his trial, the jury shall find the goods stolen to exceed twelve pence in value, the offender shall have judgment to die for the fault. *Dalt. c. 154.*

It seemeth, that all petit larceny is felony, and consequently requires the word *feloniously* in an indictment for it; yet it is certain, that it is not punishable with the loss of life or lands, but only with the forfeiture of goods, and whipping, or other corporal punishment. 1 *Haw.* 95.

By the penitentiary law, it was enacted, that if any person should feloniously take, steal, and carry away, any goods or chattels, under the value of four dollars, the same order and course of trial should be had and observed as for other simple larcenies (which was agreeable to the common law, 4 *Bl. Com.* 229) and he, she, or they, being thereof legally convicted, should be deemed guilty of *petit larceny*, and should restore the goods and chattels so stolen, or pay the full value thereof to the owner or owners, and be further sentenced to undergo a confinement in the penitentiary, for a period not less than six months, nor more than one year. (1 *Rev. Code*, p. 356, sect. 7.) But the mode of *trial*, and the *punishment*, has since been considerably altered. For, by act of the first of February, 1804 (2 *Rev. Code*, p. 70, sect. 4.) "All free persons, accused of petit larceny, shall be tried in the court of that county wherein such offence was committed, in the manner prescribed by the act entitled '*An act to amend the several laws concerning the penitentiary*,' and upon conviction of an offender, he or she shall be punished by stripes, on his or her bare back, not less than *ten* nor more than *forty*, for any one offence, or by confinement in the penitentiary house, for a term not less than eighteen months, at the discretion of the jury before whom such person shall be tried." The mode of trial, by the above recited act, is thus directed: "All offences, the punishment for which does not by law at present exceed a confinement in the penitentiary for a term of one year, shall be tried in the court of that county wherein such offence was committed; and in order to carry this power more fully into effect, *Be it further enacted*, That the several courts sitting for the examination of persons accused of crimes shall, if they are of opinion that the party ought to be further prosecuted, and that the offence with which he or she stands charged is cognizable before the county or corporation courts, by this act, take the recognizance of such person, with sufficient security for his or her appearance at the next quarterly term held for such county or corporation, and in case of refusal or inability to give such security, he, she, or they, shall be committed to prison, until discharged by due course of law."

"The mode of trial shall be, by indictment found by the grand jury of such county or corporation, according to the rules adopted in the district courts. The sheriff shall immediately thereupon summon twelve good and lawful men, not members of the grand jury, and in every respect qualified as *venire men*, as directed by law in the said district courts, who shall constitute a jury for the trial of such offender." 2 *Rev. Code*, p. 24, sect. 4.

Persons convicted under this act were punishable by stripes, not less than ten nor more than forty, for any one offence, or by con-

fillement in the penitentiary, for a term to be fixed by the verdict of the jury, not less than six months nor exceeding twelve months, at the election of the convict, to be made before the jury retired; and on a second conviction of a like offence, he might be sentenced to the penitentiary, for a term not less than *one* nor more than *two* years. But, by the act of the first of February, 1804, above recited (2 *Rev. Code*, p. 79.) this election of the convict seems to be taken away.

"If any person shall steal any hog, shoat, or pig, such person shall be adjudged to be guilty of petit larceny, and shall have the same trial and punishment, as in other cases of petit larceny." 2 *Rev. Code*, p. 80, sect. 4. See HOG-STEALING.

### III. LARCENY FROM THE PERSON.

Larceny from the person of a man either puts him in fear, and then it is called *robbery*; or does not put him in fear, and then it is called barely, *larceny from the person*. 1 *Hawk*. 147. See title ROBBERY.

### IV. LARCENY FROM THE HOUSE.

This is to be understood where the offence falls short of BURGLARY, which see.

Some of the offences in stealing from a house have already been noticed, under title CLERGY, [BENEFIT OF] which see.

"All and every person and persons, that shall at any time, either in the night or the day, feloniously break any warehouse, or storehouse, and shall take therefrom any money, goods or chattels, wares or merchandises, of the value of four dollars or more, although the owner of such goods, or any other person or persons, be or be not in such warehouse or storehouse, or shall aid, assist, counsel, hire, or command any person or persons so to break and rob any such warehouse or storehouse, and shall be thereof convicted or attainted, or being thereof indicted, shall stand mute, or will not answer directly to the indictment, or shall peremptorily challenge above the number of twenty persons returned to be of the jury, shall, by virtue of this act, be absolutely debarred of and from the benefit of clergy." 1 *Rev. Code*, p. 206, sect. 2.

The offence of *receiving stolen goods* is considered under title ACCESORARY, which see.

#### (A) Warrant for larceny.

county, to wit.

To the constable of the said county.

Whereas A J, of                      in the county of                      hath this day made information and complaint, upon oath, before me                      a justice of the peace for the said county, that this present day divers goods of him the said A J, to wit                      have feloniously been stolen, taken and carried away, from the house of him the said A J, at                      aforesaid, in the county aforesaid, and that he hath just cause to suspect, and doth suspect, that A O, late of                      feloniously did steal,

take, and carry away the same. These are therefore to command you forthwith to apprehend him the said A O, and to bring him before me, to answer unto the said information and complaint, and to be further dealt with according to law. Herein fail you not. Given under my hand and seal, the                      day of                      in the year

NOTE.... The form of a warrant to search for stolen goods is inserted under the title SEARCH WARRANT.

For the forms of a MITTIMUS, RECOGNIZANCE, &c. see title CRIMINALS.

*(B) Indictment for grand or petit larceny in general.*

county, to wit.

The jurors, &c. upon their oath present, That A O, late of in the county of                      labourer, on the                      day of                      in the year                      with force and arms, at                      in the county aforesaid, one linnen sheet, of the value of                      of the goods and chattels of one A J, then and there being, feloniously did steal, take and carry away, against the peace and dignity of the commonwealth.

*(C) Indictment for breaking a house in the day time, some person being therein.*

county, to wit.

The jurors, &c. upon their oath present, That A O, late of in the county of                      labourer, on the                      day of                      in the year                      at the hour of                      in the afternoon of the same day, with force and arms, at                      in the county of                      the dwelling house of one A J, there situate (one B J, wife of the said A J, in the same house, in the peace of God and of the commonwealth, then being) feloniously did break and enter, and one silver spoon, of the value of                      of the goods and chattels of him the said A J, then and there feloniously did steal, take, and carry away, and her the said B J then and there in bodily fear and danger of her life feloniously did put; against the peace and dignity of the commonwealth.

*(D) Indictment for breaking a house in the day time, no person being therein.*

county, to wit.

The jurors, &c. upon their oath present, That A O, late of on the                      day of                      in the year                      at the hour of                      in the afternoon of the same day, with force and arms, at in the county aforesaid, the dwelling house of one A J, there situate, feloniously did break and enter, and one silver spoon, of the value of                      of the goods and chattels of him the said A J, then and there feloniously did steal, take, and carry away; against the peace and dignity of the commonwealth.

(E) *Indictment for breaking a warehouse or storehouse, and stealing thereout above the value of four dollars.*

county, to wit.

The jurors for &c. upon their oath do present, That A O, late of in the county of aforesaid, labourer, on the day of in the year and in the year of the commonwealth, with force and arms, at in the county aforesaid, the storehouse of one A J, there situate, feloniously did break and enter, and one piece of cloth (commonly called cloth) of a black colour, of the value of *twenty* dollars, of the goods and chattels of him the said A J, in the storehouse of him the said A J then and there being found, then and there privately and feloniously did steal. take and carry away ; against the peace and dignity of the commonwealth.

## LEWDNESS.

1. ALTHOUGH lewdness be properly punishable by the ecclesiastical law, yet the offence of keeping a bawdy house cometh under the cognizance of the law temporal, as a common nuisance, not only in respect of its endangering the public peace, by drawing together dissolute and debauched persons, but also in respect of its apparent tendency to corrupt the manners of both sexes. 3 *Inst.* 205. 1 *Hawk.* 96.

2. And in general, all open lewdness, grossly scandalous, is punishable upon indictment at common law. 1 *Hawk.* 7.

3. Offenders of this kind are punishable not only with fine and imprisonment, but also with such infamous punishment as to the court, in discretion, shall seem proper. *Ibid.* 196.

4. And upon information given to a constable, that a man and woman are in adultery, or fornication, together, or that a man and woman of evil report are gone to a suspected house together, in the night, the officer may take company with him, and if he find them so, he may carry them before a justice, to find sureties of the good behaviour. *Dal. Ch.* 124. 2 *Hawk.* 61.

5. For it seems always to have been the better opinion, that a man may be bound to his good behaviour for haunting bawdy houses with women of bad fame, as also for keeping bad women in his own house. 1 *Hawk.* 132.

6. And a wife may be indicted together with her husband, and condemned to the pillory with him, for keeping a bawdy house ; for this is an offence as to the government of the house, in which the wife has a principal share, and also such an offence as may generally be presumed to be managed by the intrigues of her sex. *Ibid.* 2.

7. 'If a wife go away, and remain with an adulterer, without being reconciled to her husband, she shall lose her dower. 1 *Inst.* 435. 1 *Rev. Code*, p. 171, sect. 10.

8 But if a person is indicted for frequenting a bawdy house, it must appear that he knew it to be such a house; and it must be expressly alleged, that it is a bawdy house, and not that it is suspected to be so. *Wood. B.* 3. ch. 3.

9. On an indictment for keeping a disorderly house, a female witness swore, that she was a sailor's wife, and during her husband's absence she had often prostituted herself there. Lord Raymond said, it was an odious piece of evidence, and ought not to be heard. 3 *Burn's Just* 98. (15th edit.)

10. But it is said, a woman cannot be indicted for being a bawd generally, for that the bare solicitation of chastity is not indictable. 1 *Hawk.* 196 1 *Salk.* 382.

11. It is an indictable offence to frequent houses of ill fame, or to be guilty of grossly scandalous and public indecency, for which the punishment is by fine and imprisonment. But the temporal courts take no notice of the crime of adultery, otherwise than as a private injury. 4 *Bl. Com.* 65. But see title FORNICATION.

### *Indictment for keeping a disorderly house.*

The jurors for &c. upon their oath present, That A O, late of  
in the said county, labourer, on the                      day of  
in the year                      and in the                      year of the commonwealth,  
and at divers other times, as well before as after, with force and arms,  
at                      aforesaid, in the county aforesaid, did keep and maintain,  
and yet doth keep and maintain, a certain common, ill governed and  
disorderly house, and in the said house, for his own lucre and gain,  
certain evil and ill disposed persons, as well men as women, of evil  
name and fame, and of dishonest conversation, to frequent and come  
together there, and the said divers other times there unlawfully and  
wilfully did cause and procure; and the said men and women, in the  
said house, at unlawful times, as well in the night as in the day, then,  
and the said other times, there to be and remain, drinking, tippling,  
whoring, and misbehaving themselves, unlawfully and wilfully did  
permit, and yet doth permit, to the great damage and common nuisance  
of all the citizens of this commonwealth, and against the peace  
and dignity of the commonwealth.

## LIBEL.

1. A LIBEL is a malicious defamation of any person, expressed either in printing or writing, signs or pictures, to asperse the reputation of one that is alive, or the memory of one that is dead. *Wood*, B. 3. ch. 3.

2. *A malicious defamation....* And the scandal which is expressed in a scoffing and ironical manner is as properly a malicious defamation, as that which is expressed in direct terms: as, where a person proposes one to be imitated for his courage, who is known to be a great statesman, but no soldier; and another to be imitated for his learning, who is known to be a great general, but no scholar; and the like; which kind of writing is as well understood to mean only to upbraid the parties with the want of those qualities, as if it had directly and expressly done so. 1 *Hawk.* 194.

3. And from the same foundation, it hath also been resolved, that a defamatory writing, expressing one or two letters of a name, in such a manner that from what goes before, and follows after, it must needs be understood to signify such a particular person, in the plain, obvious, and natural construction of the whole, and would be perfect nonsense if restrained to any other meaning, is as properly a libel, as if it had expressed the whole name at large; for it brings the utmost contempt upon the law to suffer its justice to be eluded by such trifling evasions, and it is a ridiculous absurdity to say, that a writing, which is understood by every the meanest capacity, cannot possibly be understood by a judge and jury. *Ibid.*

4. And it matters not whether the libel be true, or whether the party against whom it is made be of good or bad fame; for in a settled state of government, the party grieved ought to complain for any injury done to him in the ordinary course of law, and not by any means to revenge himself, either by the odious course of libelling, or otherwise. (5 Co. 125.) But this is to be understood when the prosecution is by information or indictment; for in an action on the case, one may justify that it is true. *Wood*, B. 3. ch. 3. 3 *Bl. Com.* 126.

5. *Of any person....* Where a writing inveighs against mankind in general, or against a particular order of men, as for instance, men of the gown, this is no libel; but it must descend to particulars and individuals to make it a libel. 3 *Salk.* 224.

6. *Expressed either in printing or writing, signs or pictures....* A libel is either in writing or without writing. In writing, when an epigram, rhyme, or other writing, is published, to the contumely of another, by which his fame or dignity may be prejudiced. Without writing, may be by pictures, as to paint the party in any shameful and ignomi-

nious manner ; or by signs ; as to fix a gallows, or other reproachful and ignominious signs at a man's door. 5 Co. 125.

7. The mayor of Northampton sent lord Halifax a licence to keep a public house, which the court said was a libel in the case of a person of his quality, and granted an information for it. Str. 422.

8. *Or the memory of one that is dead.....* For the offence is the same, whether the person libelled be alive or dead. 5 Co. 125.

### *Who are punishable for it.*

1. It is certain that not only he who composes a libel, or procures another to compose it, but also he who publishes, or procures another to publish it, are in danger of being punished for it ; and it is said not to be material whether he who disperses a libel knew any thing of the contents or effect of it or not, for nothing would be more easy than to publish the most virulent papers, with the greatest security, if the concealin<sup>g</sup> the purport of them from an illiterate publisher would make him safe in dispersing them. 1 Hawk. 195.

2. Also, it hath been said, that if he who hath either read a libel himself or hath heard it read by another, do afterwards maliciously read or repeat any part of it in the presence of others, or lend or show it to another, he is guilty of an unlawful publication of it. *Ibid.*

3. Also, it hath been holden that the copying of a libel shall be a conclusive evidence of the publication of it, unless the party can prove that he copied it for the magistrate to examine it. *Ibid.*

4. And it hath been ruled, that the finding a libel on a bookseller's shelf, is a publication of it by the bookseller, and that it is no excuse to say, that the servant took it into the shop without the master's knowledge, for the law presumes the master is to be acquainted with what the servant does. 1 Sess. 633. *K. vs. Dodd.*

5. And it seems to be the better opinion, that he who first writes a libel, dictated by another, is thereby guilty of making it, and consequently punishable for the bare writing, for it was no libel till it was reduced to writing ; for the essence of a libel consisteth in the writing of it ; since, if a man speaks such words, unless the words be put in writing, it is not a libel. 1 Salk. 419.

6. Also, it hath been resolved that the sending of a letter full of provoking language to another, without publishing it, is highly punishable, as manifestly tending to a disturbance of the peace. 1 Hawk. 195.

7. But it hath been resolved, that he who barely reads a libel in the presence of another, without knowing it before to be a libel, or who is only proved to have had a libel in his custody, shall not, in respect of any such act, be adjudged the publisher of it. But the having in one's custody a written copy of a libel publicly known, is an evidence of the publication of it. 1 Hawk. 196.

8. The way for a man to keep himself out of danger in such case is, if he find a libel, and it be composed against a private person, he either may burn it, or forthwith deliver it to a magistrate ; but if it concerns a magistrate, or other public person, he ought immediately to deliver it to a magistrate, to the intent, that by examination and inquiry the author may be found and punished. 5 Co. 125.



*How punishable.*

1. There seemeth to be no doubt but that the offenders may be condemned to pay such fine, and also to suffer such corporal punishment, as to the court in discretion shall seem proper, according to the heinousness of the crime and the circumstances of the offender. 1 *Hawk.* 196.

2. And it hath been adjudged that libels, as having a direct and immediate tendency to a breach of the peace, are indictable before justices of the peace. 2 *Hawk.* 40.

3. An indictment setting forth the offence to the effect following had been naught, being vague and useless words, for the court must judge of the words themselves; but the words, according to the tenor, do correct the defect, for they import the very words themselves, for the tenor of a thing is the transcript and true copy of it, to which it may be compared, and therefore of words spoken there can be no tenor, because there is no written original. 2 *Salk.* 417. 3 *Salk.* 225.

4. And it must be proved to be written or published in the country laid in the indictment, all matters of crime being local. *St. Tr. V.* 3. 774, 775.

*Indictment for publishing a scandalous and libellous letter, imputing the crime of theft to the prosecutor.*

county, to wit:

The jurors for, &c. upon their oath present, that late of the parish of in the county of gentleman, being a person of an envious, evil, and wicked mind, and of a most malicious disposition, and wickedly, maliciously, and unlawfully minding, contriving, and intending, as much as in him lay, to injure, oppress, aggrieve, and vilify the good name, fame, credit, and reputation of one gentleman, a good, peaceable, and worthy citizen of this commonwealth, and to bring him into great contempt, hatred, infamy, and disgrace, on the day of in the year with force and arms, at the parish aforesaid, in the county aforesaid, a certain false, scandalous, and libellous writing against the said falsely, maliciously, and scandalously, did frame and make, and in the name of him the said then and there did cause to be written and published, in the form of a letter, directed to him the said the tenor of which said writing is as follows, to wit, To These scoundrel (meaning the said ) it may not be amiss to acquaint you (meaning him the said ) as the time draws near, you (meaning the said ) may be preparing yourself (again meaning the said ) for a trial, for stealing the turkies out of my (meaning his the said ) yard, when I hope to see you (meaning the said ) sing a neck psalm, and perish according to law, you hell-hound (meaning the said ) subscribed (meaning himself the said ) and that the said with intention to scandalize the said and to bring him into contempt, hatred, infamy, and disgrace, the said false, malicious, scandalous, and libellous writing, so as aforesaid framed, written and made, afterwards, to wit, on the said day of in the year

aforesaid, and on divers other days and times, as well before as afterwards, at the parish aforesaid, in the county aforesaid, to divers citizens of this commonwealth, then and there present, falsely, maliciously, and scandalously, did openly deliver, and cause to be delivered, to the great scandal, infamy, and damage of the said to the evil example of all others in the like case offending, and against the peace and dignity of the commonwealth.

## LIMITATION.

1. 'ALL actions, suits, bills, indictments, or informations, which shall be had, brought, sued, or exhibited upon any penal law, where the punishment to be inflicted upon the offender, on conviction, shall neither be death nor imprisonment in the jail and penitentiary house, shall be had, brought, sued, exhibited or moved, within one year next after the offence committed, and not after; except where a longer or shorter time for the commencement of such suit, or prosecution, is or shall be fixed by law.' 2 *Rev. Code*, p. 80, sect. 2.

2. 'Every indictment or information for perjury, subornation of perjury, or such forgeries or publications thereof as may not be punishable by death, or imprisonment in the jail or penitentiary house, shall be exhibited or moved within three years next after the time of committing the offence, and not after.' 2 *Rev. Code*, p. 80, sect. 3.

☞ But in general, the rule is, that *no time bars the commonwealth*, on the principle of the maxim in England, *nullum tempus occurrit regi*. See 1 *Bl. Com.* 247.

3. Thus, the act of limitations will not bar a motion in behalf of the commonwealth, against a person who has improperly received public monies, and is accountable for it. 1 *H. & M.* 85.

4. So neither will any lapse of time prevent the commonwealth from suing out execution on a judgment, or put it to the necessity of reviving the judgment by *scire facias*. (4. *Hen. & Munf. Nimmo's ex'rs. vs. the commonwealth*. But this, *as it seems*, arises from an express provision of an act of Assembly.

5. 'No officer [of the militia] shall be arrested for any act, of which he may be alledged to have been guilty two years previous to the application for such arrest.' 2 *Rev. Code*, p. 137, sect. 2.

6. Prosecutions for penalties arising under the law concerning public roads must be commenced within six months. 1 *Rev. Code*, p. 29, sect. 12.

7. *Real actions*, the limitation is, 1. Of writs of *formedon*, in descent, remainder or reversion, twenty years; and of a *right of entry*,

likewise twenty years. (1 *Rev. Code*, p. 107.) *Proviso*, in favour of *infants, femes covert, non compos mentis, persons imprisoned, or out of the commonwealth*, when the right of action or of entry accrued, who have ten years allowed them after their disability removed. (1 *Rev. Code*, p. 107.) 2. Of writs of right, which may be maintained on the possession or seizen of the ancestor or predecessor, within fifty years; or any other possessory action, on such possession or seizen within forty years; but no person shall maintain a real action upon his own possession or seizen, but within thirty years. 1 *Rev. Code*, p. 107.

8. In *personal actions*, the limitation is, 1. Of actions upon the *case*, other than for slander, and such as concern the trade of merchandize between merchant and merchant, their factors or agents; actions of *account, trespass, debt*, grounded on a lending or contract without specialty, or for arrears of rent; *trover, detinue, replevin* for taking away of goods and chattels; and *trespass quare clausum fregit*, within five years. 2. Of *trespass of assault, battery, wounding, imprisonment*, or any of them, within three years. 3. Of *case for words*, within one year. (1 *Rev. Code*, p. 107, sect. 4.) And persons labouring under such legal disabilities as are above mentioned, are allowed as long time to commence their action, after the disability is removed, as was given in the first instance. *Ibid.* p. 109, sect. 12.

9. Judgments may be revived by *scire facias*, or an action of debt (where no execution has been issued) within ten years from the date of the judgment. 1 *Rev. Code*, p. 108, sect. 5.

10. Or, where execution has issued and no return made, the party in whose favour it issued may obtain other executions within ten years. *Ibid.*

11. Or, may move against any sheriff or other officer, or his or their security or securities, for not returning an execution within ten years. *Ibid.*

12. *Proviso*, in favour of *infants, feme coverts, non compos mentis, persons imprisoned, or out of the commonwealth*, who shall be allowed five years after the several disabilities are removed. 1 *Rev. Code*, p. 108, sect. 6.

13. Actions on store accounts must be commenced within one year from the delivery of the respective articles; except, that upon the death of the creditor or debtor, a further time of twelve months shall be allowed. 1 *Rev. Code*, p. 108, sect. 7, 9.

14. The dates of the delivery of the several articles shall be punctually specified; and if any merchant post-date an account, he shall forfeit ten times the amount. 1 *Rev. Code*, p. 108, sect. 8.

15. When judgment is reversed or arrested, the plaintiff may recommence it within one year thereafter. 1 *Rev. Code*, p. 108, sect. 10.

16. But where the defendants remove out of the country or county, or abscond and conceal themselves, when the cause of action accrues, they shall not have the benefit of the act of limitations. (1 *Rev. Code*, p. 109, sect. 14, 17.) Nor shall the act extend to any master of a vessel, for putting a sick or diseased sailor on shore, without providing for him; or for conveying any debtor, servant or slave out of the state. 1 *Rev. Code*, p. 109, sect. 15.

17. In suits brought against executors, or administrators, for a debt due by open account, it shall be the duty of the court to expunge all

items which appear to have been due *five* years before the death of the testator, or intestate; saving the rights of plaintiffs labouring under legal disabilities, who have three years allowed them after their respective disabilities removed. (1 *Rev. Code*, p. 167, sect. 56.) But if the court *instruct* the jury to disregard the items, it is the same thing as if they expunged them themselves. 1 *Hen. & Munf* 378.

18. Where the testator or intestate *acknowledged* the account, within less than five years before his death, the limitation shall run from the date of the *acknowledgment*, and not of the items, notwithstanding the imperative language of the act of Assembly. : 4 *Hen. & Munf*. *Brooke's adm'r v. Shelly*.

19. The regular mode for the defendant to avail himself of the statute of limitations, is to plead it in bar. 3 *Bl. Com.* 308.

20. It has been held, that where there are mutual unsettled accounts and reciprocal demands, the statute of limitation does not attach; and that the exception in that statute, as to *merchants'* accounts, is not merely confined to persons of *that description*. (*Peak. Ca. N. P.* 121. But where the demand of one party arises long after the demand of the other, that shall not revive the antecedent debt; it must be in the nature of a *running* and *mutual* account, to prevent the operation of the act. *Ibid.* 122, *per Lord Kenyon*.

21. If there be a mutual account of any sort between the plaintiff and defendant, for any item of which credit has been given within six years, that is evidence of an acknowledgment of there being such an open account between the parties, and of a promise to pay the balance, so as to take the case out of the statute of limitations. (6 *Term. Rep.* 189.) But where all the items were on one side, and the last item being within six years, it was held, that it could not draw after it those that were of longer standing. *Bull. N. P.* 149.

22. If the defendant plead the statute of limitations, and the plaintiff take issue upon it, evidence of a promise by the defendant, within *six* (*five* in Virginia) years before the commencement of the action, to pay the debt, is sufficient to take the case out of the statute. (6 *Mod.* 309. *Dean v. Crane*.) And although it be a *conditional promise*, it is sufficient if the plaintiff performs the condition; as where in assumpsit for goods sold and delivered, the defendant denied he bought the goods, but said, 'prove it and I will pay you;' this promise with a proof of the debt was held to take the case out of the statute. (1 *Salk*, 29. *Heyling v. Haskins*, 5 *Mod* 425. *Carth.* 470. 1 *L. Raym.* 389, 422. *Comy. Rep.* 54. S. C.) A distinction was formerly taken between a *promise* to pay the debt, and a *bare acknowledgment* of it within that period; the former was sufficient to take it out of the statute; but an acknowledgment did not amount to a promise, but was said to be only evidence of it, and therefore did not of itself take the case out of the statute. (2 *Vent.* 152. *Bland v. Haslerig*. 6 *Mod.* 309, 310. *Dean v. Crane*. *Carth.* 471. 2 *Shum.* 126. *Dickson v. Thompson*.) But this distinction is no longer regarded, it being now settled, that an acknowledgment of the debt takes it out of the statute of limitations. *Per Price, Baron, Exeter Lent assizes*, 1717. 12 *Fin.* 192. *MSS.* even though it be after the commencement of the action. (2 *Burr.* 1099. *Yea v. Rouraker*.) And the slightest acknowledgment has been held sufficient, as saying, 'I am ready to account, but nothing is due

to you ;' or ' if he has any demand on me, it shall be settled,' will take a debt out of the statute. (*Cowp.* 548. *Trueman v. Fenton*, per Lord Mansfield, *S. P.* 5. *Burr.* 2630. *Quantock v. England*.) It was also holden that a letter written by the defendant to the plaintiff, on being served with a writ, couched in ambiguous terms, neither expressly admitting nor denying the debt, should have been left to the jury to consider whether it amounted to an acknowledgment of the debt, so as to take it out of the statute. (*2 Term. Rep.* 760. *Lloyd v. Maund*. See also, *Eph. N. P.* 152. 3 *Chris. Bl.* 307. notes (8.) (9.) And the acknowledgment of one out of several makers of a joint and several promissory note has been holden sufficient to take it out of the statute as against the others, and may be given in evidence on a separate action against any of the others. As where, in an action on a promissory note, executed by the defendant, he pleaded the statute of limitations, and issue being joined upon it, the plaintiff produced a joint and several note, executed by the defendant and three others, and proved payment, by one of the others, of interest on the note, and part of the principal, within six years; this being thought by the learned judge who tried the case sufficient to take the cause out of the statute, as against the defendant, a verdict was found for the plaintiff; and upon a motion for a new trial, the opinion of the learned judge was confirmed by the court of king's bench, who said that payment by one is payment by all; the one acting virtually as agent for the rest, so an admission by one is an admission by all, and the law raises the promise to pay when the debt is admitted to be due; and they seemed to overrule the case of *Bland v. Haselrig*. 2 *Vent.* 151. *Doug.* 652. *Whitcomb v. Whiting*.

## LOTTERIES.

' NO person, in order to raise money for himself or another, shall publicly or privately put up a lottery of blanks and prizes, to be drawn or adventured for, or any prize or thing to be raffled or played for; and whoever shall offend herein, shall forfeit the whole sum of money proposed to be raised by such lottery, raffling, or playing, to the use of the commonwealth.' 1 *Rev. Code*, p. 176, sect. 12.

# LUNATICS.

*I. Of lunatics, or non compos mentis, by the common law.*

*II. How they shall be restrained and kept, by statute.*

## I. OF LUNATICS, OR NON COMPOS MENTIS, BY THE COMMON LAW.

1. *NON compos mentis* is of four kinds. First, *Ideota*, who are of *non sane memory* from their nativity, by a perpetual infirmity.

Secondly, Those that lose their memory and understanding by the visitation of God, as by sickness, or other accident.

Thirdly, Lunatics who have sometimes their understanding and sometimes not.

Fourthly, Drunkards, who, by their own vicious act, for a time deprive themselves of their memory and understanding. 1 *Inst.* 247.

2. He who incites a madman to commit murder, or other crime, is a principal offender, and as much punishable as if he had done it himself. 1 *Hawk.* 2.

3. But ideota, and lunatics who are under a natural disability of distinguishing between good and evil, are not punishable by any criminal prosecution. *Ibid.*

Yet drunkards shall have no privilege by their want of sound mind, but shall have the same judgment as if they were in their right senses. 1 *Inst.* 247. 1 *H. H.* 32. 1 *Hawk.* 2.

4. But if a person who wants discretion commits a trespass against the person or possession of another, he shall be compelled, in a civil action, to give satisfaction for the damage. 1 *Hawk.* 2.

5. If one who hath committed a capital offence become *non compos* before conviction, he shall not be arraigned; and if after conviction, he shall not be executed. *Hale's Pl.* 10. 1 *Hawk.* 2.

6. By the common law, if it be doubtful whether a criminal, who, at his trial, is in appearance a lunatic, be such in truth or not, it shall be tried by an inquest of office, to be returned by the sheriff; and if it be found by them that the party only feigns himself mad, and he still refuse to answer, he shall be dealt with as one that stands mute. 1 *Hawk.* 2.

It may be tried either by the inspection of the court (1 *Hale* 31. *Tr. per pais* 14. *Fitz. N. B.* 517) or by evidence given to the jury, who are charged to try the indictment (3 *Bac. Abr.* 81. 1 *Hale* 33, 35, 36. *Savil.* 50. 1 *And.* 107) or, being a collateral issue, the

fact may be pleaded and replied to *ore tenus*, and a *verdict* awarded, returnable *instantly*, in the nature of an inquest of office. (*Post*. 46. *Kely* 13. 1 *Lev*. 61. 1 *Sid*. 72. 4 *Bl. Com. App.* sect. 3.) And this method in cases of importance, doubt, or difficulty, the court will, in prudence and discretion, adopt. 1 *Hale* 35. *Sav*. 56. 1 *And*. 154.

7. Any person may justify confining and beating his friend, being mad, in such manner as is proper in such circumstances. 1 *Hawk*. 130.

8. A person of *non sane* memory shall not avoid his own act by reason of this defect, but his heir or executor may. 4 *Co. Beverley's case*.

9. If an idiot takes a wife, they are husband and wife in law, and their issue legitimate, for he is allowed to be capable of consenting to marriage. 1 *Kel*. 112.

10. To make a will it is not sufficient that the testator have memory to answer to familiar and usual questions, but he ought to have a disposing memory, so as to be able to make a disposition of his estate, with understanding and reason. 6 *Co*. 32.

A person of *non sane* memory shall not avoid his own act, by reason of this defect; but his heir or executor may. (4 *Co. Beverley's case*.) For the general learning on the doctrine of lunacy, see *Fenb. Eq. B.* 1. c. 2. and notes.

## II. HOW THEY SHALL BE RESTRAINED AND KEPT, BY STATUTE.

☞ All the laws on this subject may be found in the *Rev. Code*, vol. 1, ch. 120, p. 233. ch. 294, p. 424, and vol. 2, ch. 92, p. 118, which are too lengthy for insertion.

### (A) *Warrant for the examination of a person supposed to be of unsound mind, on sect. 3.*

county, to wit.

Whereas I have received due information that A L is a person of insane or disordered mind, and is going at large in this county, to the great danger of the citizens of the commonwealth. You are, therefore, hereby required to bring the said A L before me, or some other justice of the peace for the commonwealth, and two other justices of this county, on the       day of       next, at       in this county, to be examined concerning his state of mind, and the causes of his insanity, according to the act of Assembly in that case made. Herein fail not; and then and there make due return of this warrant. Given, &c.

### (B) *If found to be of insane mind.*

Pursuant to the within warrant, we have diligently examined, as well the said A L, as C D, E F, and G H, witnesses to the conduct and behaviour of him the said A L, whereupon it appears expedient to us, that the said A L should be removed to the public hospital for the maintenance and cure of persons of unsound mind, in the city of

Williamsburg. We have, therefore, taken the depositions of the said witnesses, in order to be transmitted, with said lunatic, to the keeper of the said hospital according to law.

J. K.  
L. M.  
N. O.

(C) *Warrant for removal.*

county, to wit.

J. K, L. M, and N O, three of the justices of the peace of the county of \_\_\_\_\_ to the sheriff of the said county, and to the keeper of the public hospital in the city of Williamsburg, for the maintenance and cure of persons of unsound mind.

Whereas, upon due examination before us, A L, of this county, hath been adjudged a person of insane or disordered mind, and we have thought it expedient that he should be removed to the public hospital for the maintenance and cure of persons of unsound mind, in the city of Williamsburg. You are, therefore, hereby authorised and required forthwith to remove the said A L to the said hospital in the city of Williamsburg, and deliver him, together with the warrant and order, the depositions of the witnesses, a certificate of the said A L's estate, and the probable annual profits thereof, and this precept, to the keeper of the said hospital, and for so doing this shall be your warrant. And you the said keeper are hereby required to receive the said A L into your custody, and him there safely to keep, till he shall be discharged by due course of law; and the several papers herewith sent to deliver to the directors of the said hospital. Given, &c.

If the justices think a guard necessary, then after *forthwith* insert, 'to impress a guard of one man (or two men) to assist you,' &c.

With this warrant must be sent a certificate of the lunatic's estate, and the annual profits.

If friends offer security, then in the order at the end add, 'but P Q, of the said county, appearing before us, and giving sufficient security that proper care shall be taken of the said A L, and that he shall be secured and restrained from going at large till he is restored to his senses, we have delivered the said A L to the said P Q.

(D) *Recognizance to be taken.*

Be it remembered, that on the \_\_\_\_\_ day of \_\_\_\_\_ in the year \_\_\_\_\_ before J K, L M, and N O, three of the justices of the peace of the county of \_\_\_\_\_ personally appeared P Q, R S, and T W, of the said county, and severally acknowledged themselves indebted to A G, governor or chief magistrate of this commonwealth, and his successors, in the sum of \_\_\_\_\_ each, to be levied of their several and respective lands and tenements, goods and chattels, and to the use of the said commonwealth rendered.

Upon this condition, that whereas A L hath, upon examination before the justices aforesaid, been adjudged to be of insane or disordered mind, and it was thought expedient that he should be removed to the public hospital for the maintenance and cure of persons of unsound mind, in the city of Williamsburg; but at the request of the said P Q,



hath been delivered to him ; if therefore the said P Q, shall take proper care of the said A L, and cause him to be kept secure, and restrained from going at large, until he be restored to his senses, then the above recognizance to be void, or else to remain in full force.

Taken and acknowledged before us,

J. K.  
L. M.  
N. O.

*(E) Certificate of removal, and of the lunatic's estate, to be made to the next court of the county after removal.*

county, to wit.

We, J K, L M, and N O, three of the justices of the peace for the county aforesaid, having, upon due examination before us had of A L, of this county, been of opinion that he was a person of unsound mind, and that it was expedient he should be removed to the public hospital for the maintenance and cure of persons of unsound mind, in the city of Williamsburg, and having accordingly directed him to be so removed by our order, bearing date the            day of            last past ; we do therefore hereby certify the same to the court of this county, together with the annexed certificate of the estate of the said A L, which is all that has yet come to our knowledge. Given, &c.

J. K.  
L. M.  
N. O.

To the above warrant should be annexed an inventory of all the insane's estate, both real and personal.

*(F) Certificate to the officer and guard, conveying a lunatic to the hospital, and who was not received, on ch. 92, sect. 1, of 2 Rev. Code, p. 118.*

county, to wit.

Whereas A L, of            was, by our warrant, bearing date the            day of            &c. sent to the hospital at Williamsburg, for the reception of persons of unsound minds, and was conducted thither by B S, sheriff of the county of            and C G and D G, acting as a guard ; but the said A L not being received by the court of directors of the said hospital, for want of room (or, if for any other cause, express it) was brought back by the said B S, C G, and D G, to this county, and produced to us there.\* These are therefore to certify, that the distance from the place whence the said A L was sent, to the said hospital, is            miles, and that in going and returning with him, the officer and guard necessarily ordered the ferries of            over            &c. (describing them all.) Given under our hands, &c.

J. K.  
L. M.  
N. O.

☞ If it be necessary to confine the person, after his return, the warrant to the jailer may pursue the above form to the asterisk, \* then say: These are therefore to require you to receive the said A L, and him safely keep in your custody, till discharged by due course of law.

To the sheriff or jailor of \_\_\_\_\_ county.

## MAIM.

1. MAIM is such a hurt of any part of a man's body, whereby he is rendered less able in fighting, either to defend himself, or annoy his adversary. 1 *Hawk.* 111.

2. For the members of every citizen are under the safe-guard and protection of the law, to the end a man may serve the commonwealth, when occasion shall be offered; and therefore a person who maims himself, that he may have the more colour to beg, may be indicted and fined. 1 *Inst.* 127.

3. The cutting off, or disabling, or weakening a man's hand or finger, or striking out his eye, or foretooth, or castrating him, are said to be maims, but the cutting off his ear, or nose, were not esteemed maims at the common law, because they do not weaken, but only disfigure him. 1 *Hawk.* 111, 112.

4. It is said, that anciently castration was punished with death; and other mainis, with the loss of member for member; but afterwards no maim was punished in any case with the loss of life or member, but only with fine and imprisonment. *Ibid.*

5. But by *Virg. Laws*, ch. 99, p. 178, sect. 1. (before the adoption of the penitentiary system) "if any person or persons shall unlawfully cut out or disable the tongue, put out an eye, slit a nose, bite or cut off a nose or lip, or cut off or disable any limb or member of any person whatsoever, within the commonwealth; in so doing to maim or disfigure, in any of the manners before mentioned, such person, the person or persons so offending, their counsellors, aiders, and abettors, knowing of and privy to the offence, shall be, and are hereby declared to be felons, and shall suffer as in case of felony."

6. Sect. 2. "If any person shall shoot, or stab any person within the commonwealth, with an intent to maim, disfigure, or kill, the person or persons so offending, their counsellors, aiders, and abettors, knowing of and privy to the offence, shall be, and are hereby declared to be felons, and shall suffer as in case of felony."

7. And by the penitentiary law (1 *Rev. Code*, p. 357, sect. 10.) "whoever on purpose, and of malice aforethought, by lying in wait, shall unlawfully cut out or disable the tongue, put out an eye, slit the nose, ear or lip, or cut off or disable any limb or member of another, with intention in so doing to maim or disfigure such person, or shall volun-

tarily, maliciously, and of purpose, pull or put out an eye; while fighting or otherwise, every such offender, his or her aiders, abettors and counsellors, shall be sentenced to confinement in the penitentiary, for any time not less than *two* nor more than *ten* years; and shall also pay a fine not exceeding one thousand dollars, three fourths whereof shall go to the party injured.

8. Whoever shall voluntarily, maliciously, and of purpose, bite off a nose, ear or lip, or bite off or disable any limb or member of another, with intention in so doing to kill, maim or disfigure such person, every such offender, his or her aiders, abettors and counsellors, shall be sentenced to a confinement in the penitentiary, for the same period as above mentioned, and pay the same fine, to be disposed of in the same way. See 2 *Rev. Code*, p. 15, sect. 2.

9. The same punishment and fine are inflicted on an offender, his aiders, &c. for wilfully, maliciously, and of purpose, stabbing or shooting another, with intention to maim, disfigure, disable or kill. *Ibid.* sect. 3.

10. And the party grieved shall be a competent witness. *Ibid.* p. 16, sect. 4.

11. The same confinement is inflicted on an offender, for voluntarily, and of purpose, slitting the ear or lip of another, with intent to mark or disfigure such person. *Ibid.* p. 81, sect. 10.

12. If a man attack another, with intent to murder him, and he does not murder, but only maim him, the offence is nevertheless within the statute. 1 *Haw.* 112.

One Mr. *Coke*, a gentleman of Suffolk, and one *Woodburn*, a labourer, were indicted, in 1722, *Coke* for hiring and abetting *Woodburn*, and *Woodburn* for the actual fact of slitting the nose of Mr. *Crispe*. The murder of *Crispe* was intended, and he was left for dead, being terribly hacked and disfigured with a hedge bill; but he recovered. Now the bare intent to murder is no felony; but to disfigure, with an intent to disfigure, is made so by this statute, on which they were therefore indicted. And *Coke* rested his defence upon this point, that the assault was not committed with an intent to disfigure, but with an intent to murder, and therefore not within the statute. But the court held, that if a man attack another to murder him with such an instrument as a hedge bill, which cannot but endanger the disfiguring him; and in such attack happens not to kill, but only to disfigure him; he may be indicted on this statute; and it shall be left to the jury, whether it was not a design to murder by disfiguring, and consequently a malicious intent to disfigure as well as to murder. Accordingly the jury found them guilty of such previous intent to disfigure, in order to effect their principal intent to murder. And they were both condemned and executed. 4 *Bl. Com.* 207. See also *Leach* 59, 192.

13. If the maim come not within any of the descriptions in the act, yet it is indictable at the common law, and may be punished by fine and imprisonment. Or an appeal may be brought for it at the common law; in which the party injured shall recover his damages; or he may bring an action of trespass; which kind of action hath now generally succeeded into the place of appeals in smaller offences not capital. 2 *Haw.* 157, 160.

14. It doth not seem, that in maiming there may be accessories after the fact. *Ibid.* 311.

☞ For a WARRANT, COMMITMENT, &c. see title CRIMINALS.

*Indictment of felony by slitting the nose, and against the aider and abettor.*

to wit.

The jurors, &c. upon their oath present, That J W, late of the parish of            in the county of            labourer, and A C, late of the parish aforesaid, in the county aforesaid, esquire, on the            day of            in the year            and in the            year of the commonwealth, contriving and intending one E C, then and yet being a citizen of the said commonwealth, to maim and disfigure, at the parish aforesaid, in the county aforesaid, with force and arms, in and upon the said E C, in the peace of God and of the said commonwealth then and there being, on purpose, and on malice aforethought, and by lying in wait, unlawfully and feloniously did make an assault, and the said J W, with a certain iron bill, of the value of one penny, which he the said J W, in his right hand then and there had and held, the nose of the said E C, on purpose, and of his malice aforethought, and by lying in wait, then and there unlawfully and feloniously did slit, with intention the said E C, in so doing, in manner aforesaid, to maim and disfigure; and that the aforesaid A C, at the time the aforesaid felony, by the said J W, in manner and form aforesaid, was done and committed, to wit, on the said            day of            in the            year of our Lord aforesaid, and in the            year of the commonwealth aforesaid, with force and arms, on purpose, and of his malice aforethought, and by lying in wait, unlawfully and feloniously was present, aiding and abetting the said J W, in the felony aforesaid, in manner and form aforesaid done and committed: and so the jurors aforesaid, upon their oath aforesaid, do say, that the said J W and A C, on the said            day of            in the            year of the commonwealth aforesaid, at the parish aforesaid, in the county aforesaid, with force and arms, on purpose, and of their malice aforethought, and by lying in wait, the felony aforesaid, in form aforesaid, unlawfully and feloniously did do and commit, and each of them did do and commit, against the peace and dignity of the commonwealth, and against the form of the statute in such case made and provided.

MAINPRIZE. See BAIL.

# MAINTENANCE.

## *I. Of maintenance in general. II. Of champerty in particular. III. Of embracery in particular.*

### I. OF MAINTENANCE IN GENERAL.

#### *I. What it is. II. How punishable by the common law.*

##### I. WHAT IT IS.

1. MAINTENANCE (*manu tenere*) is an unlawful taking in hand or upholding of quarrels or suits, to the disturbance or hindrance of common right. 1 *Haw.* 249. 4 *Bl. Com.* 134.

2. And it is twofold :

One in the *country* ; as where one assists another in his pretensions to certain lands, by taking or holding the possession of them for him by force or subtilty ; as where one stirs up quarrels and suits in the country, in relation to matters wherein he is no ways concerned ; and this kind of maintenance is punishable at the commonwealth's suit by fine and imprisonment, whether the matter in dispute any way depended in plea or not ; but it is said not to be actionable. 1 *Haw.* 249.

Another in the courts of *justice* ; where one officiously intermeddles in a suit depending in any such court, which no ways belongs to him, by assisting either party with money or otherwise, in the prosecution or defence of any such suit. *Ibid.*

3. Of this second kind of maintenance there are three species :

First, Where one maintains another, without any contract to have part of the thing in suit ; which generally goes under the common name of *maintenance*.

Secondly, Where one maintains one side, to have part of the thing in suit ; which is called *champerty*.

Thirdly, Where one laboureth a jury ; which is called *embracery*. 1 *Haw.* 249.

4. But it seemeth to be agreed, that wherever any persons claim a common interest in the same thing, as in a way, church-yard, or common, by the same title, they may maintain one another in a suit relating to the same. *Ibid.* 252.

5. Also that whoever is any way of kin or affinity to the party, may counsel and assist him, but that he cannot justify the laying out of his

own money in the cause, unless he be either father, or son, or heir apparent. 1 *Haw.* 252. 4 *Bl Com.* 135.

6. Also, that any one in charity may lawfully give money to a poor man to enable him to carry on his suit. 1 *Haw.* 253.

## II. HOW PUNISHABLE BY THE COMMON LAW.

It seemeth, that all maintenance is not only *malum prohibitum* by statute, but is also *malum in se*, and strictly prohibited by the common law, as having a manifest tendency to oppression; and therefore it is said, that all offenders of this kind are not only liable to an action of maintenance, at the suit of the party grieved, wherein they shall render such damages as shall be answerable to the injury done to the plaintiff; but also that they may be indicted as offenders against public justice, and adjudged thereupon to such fine and imprisonment, as shall be agreeable to the circumstance of the offence. Also it seemeth, that a court of record may commit a man for an act of maintenance done in the face of the court. 2 *Inst.* 212. 1 *Haw.* 255.

☞ The statutes of England, concerning maintenance, have not been adopted by our laws.

## II. OF CHAMPERTY IN PARTICULAR.

*I. What it is. II. How punishable by the common law. III. How by statute.*

### I. WHAT IT IS.

Champerty (*from campi parti*) is the unlawful maintenance of a suit, in consideration of some bargain to have part of the lands or things in dispute, or part of the gains. 1 *Haw.* 156. 33 *Ed. 1. St.* 2.

Every champerty is maintenance, but every maintenance is not champerty: for champerty is but a *species* of maintenance, which is the *genus*. 2 *Inst.* 208.

### II. HOW PUNISHABLE BY THE COMMON LAW.

Champerty was an offence at the common law, and as such is punishable in like manner as hath been expressed in treating of maintenance in general. 2 *Inst.* 208.

### III. HOW BY STATUTE.

"Champertors be they that move pleas and suits, and cause them to be moved, by their own procurement or by others, and sue them at their own proper costs and charges, to have a part of the land in variance, or part of the gains; and those who are convicted thereof by the verdict of a jury shall be punished, by imprisonment and amercement, at the discretion of the jury before whom they shall have been found guilty, and such amercement and imprisonment shall be ascertained at the time of such conviction." 1 *Rev. Code*, ch. 97, p. 177.

### III. OF EMBRACERY IN PARTICULAR.

*I. What it is. II. How punishable by the common law. III. How by statute.*

#### I. WHAT IT IS.

1. It seems clear, that any attempt whatsoever to corrupt, or influence or instruct a jury, or any way to incline them to be more favourable to the one side than the other, by money, promises, letters, threats, or persuasions, is a proper act of *embracery*, whether the jury to whom such attempt is made give any verdict or not, or whether the verdict given be true or false. 1 *Haw.* 259.

2. And the law so far abhors all corruption of this kind, that it prohibits every thing which has the least tendency to it, what specious pretence soever it may be covered with, and therefore it will not suffer a mere stranger so much as to labour a juror to appear and act according to his conscience. *Ibid.*

3. But any person who may justify any other act of maintenance, may safely labour a juror to appear and give a verdict according to his conscience; but no one whatsoever can justify the labouring a juror not to appear. *Ibid.* 260.

#### II. HOW PUNISHABLE BY THE COMMON LAW.

There is no doubt, but that offences of this kind do subject the offender either to an indictment or action, in the same manner as all other kinds of unlawful maintenance do by the common law. *Ibid.*

#### III. HOW BY STATUTE.

"If any juror, upon any inquest whatsoever, shall take any thing by himself or another, to give his verdict, and shall be thereof convicted, such juror shall not thereafter be put on any jury, and shall pay ten times as much as he shall have taken; whereof one half shall go to him who will sue for the same, and the other half to the commonwealth." 1 *Rev. Code*, ch. 48, p. 47, sect. 3.

"Every embracer, who shall procure any juror to take gain or profit, shall be punished by fine not exceeding two hundred pounds, and imprisonment not exceeding one year." *Ibid.* sect. 4.

#### *Indictment for maintenance.*

The jurors for the commonwealth, upon their oath present, That A O, late of                    in the county aforesaid, yeoman, on the day of                    in the                    year of                    with force and arms, at                    aforesaid, in the county aforesaid, did unjustly and unlawfully maintain and uphold a certain suit, which was then depending in the court of the commonwealth, between A P, plaintiff, and A D, defendant, in a plea of debt, on the behalf of the said A P, against the said A D, contrary to the form of the statute in such case made and

provided, and to the manifest hindrance, and the disturbance of justice, and in contempt of the said commonwealth and the laws thereof, and to the great damage of the said A D, and against the peace and dignity of the commonwealth.

## MANDAMUS.

1. A WRIT of *mandamus* is, in general, a command issuing from a superior court, having competent authority for that purpose, and directed to any person, corporation, or inferior court of judicature, requiring them to do some *particular* thing therein specified, which appertains to their office and duty, and which the superior court has previously determined, or at least supposes to be consonant to right and justice. 3 *Bl. Com.* 110.

2. Applications for *mandamus* should always be supported by affidavits, that the court may judge of the propriety of granting them; and this is the constant practice. See *Buller's N. P. under this head.*

3. And therefore, if it does not appear to the court what the office is, to which the party wishes admittance, the court will refuse a *mandamus*. 2 *Mod.* 316.

4. Where the *mandamus* is pursued as a remedy to enforce obedience to the laws of the commonwealth, it is grantable of common right; but where the right is of a private nature, as to an office, &c. it is discretionary in the court to grant or refuse it. 11 *Co. Bagg's case. B. N. P. ' Mandamus.'*

5. It is a writ of a most extensive remedial nature; and may be issued in some cases where the party injured hath also another more tedious method of redress; as in the case of admission or restitution to an office; but it issues in all cases, where the party hath a right to have any thing done, and hath no other specific means of compelling its performance. 3 *Bl. Com.* 110.

6. But it ought not to be granted (except in very particular cases) where the party applying for it has a specific legal remedy. 3 *Burr.* 1265. 4 *Burr.* 2186. *Cowp.* 378. 1 *Term. Rep.* 396.

7. This writ lies as well to restore one who has been unjustly removed, as to admit one who has a right. *Onslow's N. P.* 191.

8. It lies to admit a person to academical degrees; to the use of a meeting house, &c. for the production, inspection, or delivery, of public books and papers; for the surrender of the *regalia* of a corporation; to oblige bodies corporate to affix their common seal; to compel the holding of a court; and for an infinite number of other purposes, which it is impossible to recte minutely. But at present, we are more



particularly to remark, that it issues to the judges of any inferior court, commanding them to do justice according to the powers of their office, whenever the same is delayed. 3 *Bl. Com.* 110. See 1 *Wils.* 12, 21, 76, 125, 133, 138, 206, 283, 305.

9. This writ is grounded on a suggestion by the party injured, of his own right, and the denial of justice below; whereupon, in order to satisfy the court more fully that there is a probable ground for such interposition, a rule is made (except in some general cases, where the probable ground is manifest) directing the party complained of to shew cause why a writ of *mandamus* should not issue. 3 *Bl. Com.* 111.

10. But where the *mandamus* is to swear or admit, the court will, in case the right appear plain, grant the writ upon the first motion; but where it is to restore one who has been removed, they would first grant a rule to shew cause why such a writ should not issue. *Onsl. N. P.* 191.

11. And note, the rule to shew cause must always be to the same persons to whom the writ is to be directed. *Onsl. N. P.* 191.

12. Where the court grants a rule to shew cause, though upon shewing cause it appears doubtful whether the party have a right or not, yet the court will issue the *mandamus*, in order that the matter may be tried upon the return. *Onsl. N. P.* 192.

13. If on the rule to shew cause no sufficient cause is shewn, the writ itself issues. 3 *Bl. Com.* 111.

14. The first writ of *mandamus* always concludes with commanding obedience, or cause to be shewn to the contrary; but if a return be made to it, which upon the face of it is insufficient, the court will grant a *peremptory mandamus*, to do the thing absolutely; to which no other return will be admitted, but a due execution of the writ; and if that be disobeyed, an attachment will issue against the persons disobeying it. *Onsl. N. P.* 193. 3 *Bl. Com.* 111.

15. So if no return be made, the court will grant an attachment against the persons to whom the *mandamus* was directed; with this difference, however, that where a *mandamus* is directed to a corporation to do a corporate act, and no return is made, the attachment is granted only against those particular persons who refuse to pay obedience to the *mandamus*; but where it is directed to several persons in their natural capacity, the attachment for disobedience must issue against all, though, when they are before the court, the punishment will be proportioned to their offence. *Onsl. N. P.* 193.

16. But if the return upon the face of it be good, though the matter of it be false, the court will not try the truth of the facts upon affidavits, but will for the present believe it, and proceed no further upon the *mandamus*. But then the party injured may have an action against him for his false return, and (if found to be false by the jury) shall recover damages equivalent to the injury sustained; together with a *peremptory mandamus* to the defendant to do his duty. 3 *Bl. Com.* 111. *Onsl. N. P.* 194.

17. An action will lie for suppressing the truth in a return, as well as for returning a falsehood, and that if the return be true in words, but false in substance. *Doug.* 154.

18. Where the return is made by several, the action may be either joint or several, it being founded upon a tort; but if it appear upon evidence, that the defendant voted against the return, but was over-

ruled by a majority, the plaintiff shall be non-suited; and though the return be made in the name of the corporation, yet an action will lie against the particular persons who caused the return to be made; or if the matter concern the public government, and no particular person be so interested as to maintain an action, the court will grant an information against the persons making the return. *Onsl. N. P.* 194.

Note. Where several join in an application for a *mandamus*, they must all join in an action for a false return. *Ibid.*

19. What have been held sufficient returns, and what not, may be seen in *Buller's* or *Onslow's Nisi Prius*, under the head of '*Mandamus*,' and the several books of reports where that subject has come before the court.

☞ See the case of *Dew v. Judges of Sweet Springs district court* (3 *H. & M.* 1.) where the doctrine is very fully considered.

### (A) *Form of a return to a mandamus.*

(On the back of the writ the following endorsement is made.)

The execution of this writ appears in a certain schedule to this writ annexed. A B, &c.

Then on a piece of paper annexed to the writ make the following return.

*The answer, &c. to the writ to this schedule annexed, according to the command of the said writ.*

We certify, &c. (here insert the cause, &c.) See 11 *Co. Baggs's case*. 3 *L. Raym.* (pleadings) 203. *Ibid.* 1.

MANSLAUGHTER, see HOMICIDE.

## MARRIAGES.

THE rites of matrimony have been variously celebrated in Virginia, since the first settlement of the colony, as may be seen by comparing the laws referred to, in the 1st vol. of the *Statutes at Large*, under the titles in the index of '*Marriages*,' '*Matrimony*,' with those now in force. Until the year 1784 (*October session*, ch. 76) no person could celebrate the rites of matrimony but a minister of the church of England, though provision was frequently made during the revolution, for particular frontier counties, where it was otherwise. By the existing laws, any ordained minister, in regular communion with any society of Christians, may celebrate those rites according to the forms of the church to which he belongs. (See 1 *Rev. Code*, p. 193, sect. 2.) And in certain counties, where there are no ministers of the

gospel, the legislature have, from time to time, authorised the courts to appoint persons to celebrate the rights of matrimony.

A certificate of any marriage solemnized, whether by a minister, or person appointed by the court, must be returned to the clerk of the county or corporation court, within twelve months, under the penalty of sixty dollars, which must be recorded by the clerk, under a like penalty. 1 *Rev. Code*, p. 194, sect. 10, 11.

For other matters relating to marriages (and which do not particularly fall under the cognizance of a justice of the peace) see 1 *Rev. Code*, ch. 104, p. 192. Ch. 169, p. 318. Ch. 218, p. 371.

## MASTER AND SERVANT.

THE relation of master and servant as it respects them individually, as well as strangers, considered in a legal point of view, being of general concern, a few of the most important points relating to that subject are inserted.

1. If the hiring of *menial servants* (domestics) be general, without any particular time limited, the law construes it a hiring for a year. 1 *Bl. Com.* 425.

2. *Apprentices, labourers, stewards, factors, and bailiffs*, are considered by the law as servants. 1 *Bl. Com.* 427.

3. A master may by law correct his apprentice for negligence, or other misbehaviour, so it be done with moderation; though if the master or master's wife beats any other servant of full age, it is good cause of departure. 1 *Bl. Com.* 428.

4. The master may *maintain*, that is, abet and assist his servant in any action at law against a stranger, without being guilty of *maintenance*. 1 *Bl. Com.* 429.

5. A master also may bring an action against any man for beating or maiming his servant; but in such case he must assign, as a special reason for so doing, his own damage by the loss of his service; and this loss must be proved upon the trial. 1 *Bl. Com.* 429.

6. A master likewise may justify an assault in defence of his servant, and his servant in defence of his master. 1 *Bl. Com.* 429.

7. If any person do hire or retain my servant, being in my service, for which the servant departeth from me and goeth to serve the other, I may have an action for damages against both the new master and the servant, or either of them; but if the new master did not know that he is my servant, no action lies; unless he afterwards refuse to restore him upon information and demand. 1 *Bl. Com.* 429.

8. The master is answerable for the acts of his servant, if done by his command, either expressly given or implied. Therefore, if the servant commit a trespass by the command or encouragement of his master, the master shall be guilty of it; though the servant is not thereby excused, for he is only to obey his master in matters that are honest and lawful. 1 *Bl. Com.* 429.

9. If an innkeeper's servant robs his guests, the master is bound to restitution. 1 *Bl. Com.* 430.

10. So likewise, if the drawer at a tavern sells a man bad wine, whereby his health is injured, he may bring an action against the master. *Ibid.*

11. In the same manner, whatever a servant is permitted to do in the usual course of his business, is equivalent to a general command. If I pay money to a banker's servant, the banker is answerable for it. If I pay it to a clergyman's or a physician's servant, whose usual business it is not to receive money for his master, and he embezzles it, I must pay it over again. If a steward lets a lease of a farm, without the owner's knowledge, the owner must stand to the bargain; for this is the steward's business. 1 *Bl. Com.* 430.

12. A wife, a friend, a relation, that use to contract business for a man, are *quoad hoc* his servants; and the principal must answer for their conduct; for the law implies, that they act under a general command; and without such a doctrine as this, no natural intercourse between man and man could subsist with any tolerable convenience. 1 *Bl. Com.* 430.

13. If I usually deal with a tradesman by myself, or constantly pay him ready money, I am not answerable for what my servant takes up upon trust; for here is no implied order to the tradesman to trust my servant; but if I usually send him upon trust, or sometimes on trust and sometimes with ready money, I am answerable for all he takes up; for the tradesman cannot possibly distinguish when he comes by my order, and when upon his own authority. *Ibid.*

14. If a servant, by his negligence, does any damage to a stranger, the master shall answer for his neglect. If a smith's servant lames a horse while he is shoeing him, an action lies against the master, and not against the servant. But in these cases the damage must be done, while he is actually employed in the master's service; otherwise the servant shall answer for his own misbehaviour. 1 *Bl. Com.* 431.

15. Upon this principle, by the common law, if a servant kept his master's fire negligently, so that his neighbour's house was burned down thereby, an action lay against the master, because this negligence happened in his service; otherwise, if the servant going along the street with a torch, by negligence sets fire to a house; for there he is not in his master's immediate service, and must himself answer the damage personally. But now the common law is, in the former case, altered by statute. 1 *Bl. Com.* 431.

16. A master is chargeable if any of his family layeth or casteth any thing out of his house into the street or common highway, to the damage of any individual, or the common nuisance of the people; for the master has the superintendence and charge of all his household. 1 *Bl. Com.* 431.

17. Where a man gives his servant money to pay for commodities as he buys them, if the servant pocket that money, the master will not be liable to pay it over again. But if the master employs his servant to buy things on credit, he will be liable to whatever extent the servant shall pledge his credit. *Peake's N. P.* 47.

18. An action will lie for receiving or continuing to employ the servant of another, after notice, without enticing him away. A person who contracts with another to do certain work for him, is the servant of that other till the work is finished, and no other person can employ such servant to the prejudice of the first master; the very act of giving him employment is affording him the means of keeping out of his former service. *6 Term. Rep.* 221.

19. The following general conclusions may be drawn from a late decision in *1 East.* 106. Where the act of the servant is wilful, and such that an action of *trespass*, and not an action upon the *case*, must be brought, the master is not responsible, unless the act is done by his command or assent. *1 Bl. Com.* 432. *Chris. note* (12.)

But where mischief ensues from the negligence or unskilfulness of the servant, so that an action upon the *case* must be brought, and not an action of *trespass*, then the master will be answerable for the consequences, in an action upon the *case*, if it be shewn that the servant is acting in the execution of his master's business and authority. *1 Bl. Com.* 438. *Chris. note* (12.)

MEASURES, see WEIGHTS, &c.

## MILLS AND MILLER.

The proceedings on erecting mills containing nothing peculiarly relative to the duty of a single magistrate, I shall confine myself to a reference to such parts of the act of Assembly, as more immediately fall within the jurisdiction of a justice of the peace. See *1 Rev. Code*, ch. 105, p. 197. *2 Rev. Code*, ch. 100, p. 125. *Ibid.* ch. 127, p. 158.

*Warrant against a miller : on sect. 2, of 2 Rev. Code,*  
*page 126.*

county, to wit.

Complaint being this day made to me  
the peace for the said county, by that  
the said county, did, on the day of

one of the justices of  
a miller at mill, in  
last, refuse to grind a

bag of corn (or wheat) belonging to                      according to his turn ;  
 (or did not sufficiently grind a bag of corn, or wheat, belonging to the  
 said                      and carried to the said mill to be ground; or did take  
 more than one eighth part of a bag of wheat or corn belonging to the  
 said                      and carried to the said mill to be ground, for the toll thereof)  
 contrary to the act of Assembly in that case made : These are there-  
 fore, in the name of the commonwealth, to require you to bring the  
 said                      before me, or some other of the commonwealth's justices  
 of the peace for the said county, to answer the premises. Given un-  
 der my hand, the                      day of  
 To                      constable.

### *Judgment.*

On hearing the within complaint, it being duly proved before me  
 that the within named                      is guilty (*as in the warrant according to  
 the case*) by which he hath forfeited two dollars and fifty cents; it is  
 therefore considered that the within named                      recover against  
 the said                      the said two dollars and fifty cents, together with his  
 costs by him in this behalf expended. Given, &c.

Costs.

N. B. If the miller be an indented servant or slave, it should be  
 mentioned in the warrant : as, in such case, he is to be whipped for the  
 first and second offences, and afterwards the owner is made liable.

### *Warrant against the owner of a mill : on sect. 10, of 1 Rev. Code, p. 198.*

county, to wit.

Complaint, &c. (*as in the first*) that                      owner of                      mill,  
 in the said county, does not keep in the said mill a half bushel, peck,  
 and toll dish, sealed according to act of Assembly : These are, &c.  
 (*as in the first.*)

If the owner lives out of the county, and has a known attorney in it,  
 after *assembly*, add, "and that the said                      lives out of this county,  
 but that the said                      is the said                      attorney;" and then the  
 warrant is to enforce the attorney's appearance. But if the owner has  
 no known attorney in the county, then after *assembly*, add, "and that  
 the said G H lives out of this county, and has no known attorney  
 therein, but the said mill is kept by                      a servant or slave belong-  
 ing to the said                      ;" and then the warrant is to enforce the ap-  
 pearance of the servant or slave, and must be drawn accordingly.

### *Judgment.*

As the first, only taking notice whether the attorney, servant, or  
 slave appears; the fine is fifteen shillings, with costs to the informer.

1. The defendant, being a miller, was indicted for changing corn  
 delivered to him to be ground, and giving bad corn instead of it. It  
 was moved to quash it, because only a private cheat, and not of a pub-  
 lic nature; but it was answered, that being a cheat in the way of trade,

it concerned the public; and therefore was indictable. And the court was unanimous not to quash it. *Sess. Cas. V. 1. 217.*

2. Although every larceny implies a trespass, and a felonious taking of the thing stolen, yet it hath been resolved that even those who have the possession of goods, by the delivery of the party, as a carrier who hath goods to carry, and consequently a miller who hath corn delivered to him to grind, may be guilty of felony by taking away part thereof, with an intent to steal it. (1 *Haw. 90.*) See the case of *Coleman v. Moody* (4 *H. & M. 1.*) in which there are several important points decided, as to the proceedings in erecting mills.

## MISDEMEANOR.

A CRIME or misdemeanor, is an act committed or omitted in violation of a public law, either forbidding or commanding it. This general definition comprehends both crimes and misdemeanors, which properly speaking, are synonymous terms; though in common usage, the word *crime* is made to denote such offences as are of a deeper and more atrocious dye; while smaller faults and omissions of less consequence are comprised under the gentler name of *misdemeanor* only. 4 *Bl. Com. 5.*

To enumerate the various acts which have been determined to be misdemeanors, would be a work of immense labour. Suffice it to say, that the word is generally applied to all those offences for which the law has not provided a particular name; and they may be punished according to the degrees of the offence, by fine or imprisonment, or both. *Barl.*

Wherever an offence is declared by law to be a felony, it ceases to be a misdemeanor, unless it is otherwise provided. 1 *L. Raym. 712.*

The offence of receiving stolen goods, knowing them to be stolen, which is punishable as a misdemeanor by our laws, is treated of under title ACCESSORY.

MISPRISION OF FELONY. See FELONY.

MISPRISION OF TREASON. See TREASON.

MITTIMUS. See COMMITMENT.

MURDER. See HOMICIDE.

## MUTE.

THE punishment formerly inflicted by the common law, on persons standing mute on an arraignment for felony, is inserted here rather as a matter of curiosity, than because the law is ever put in force, especially since the statutes were made, which subjected the party to the same sentence, as if he was found guilty on verdict or confession.

Heretofore, says lord *Coke*, a person standing mute upon an arraignment of felony (that is, without speaking any thing at all, or without putting himself upon God and his country) was liable to a strange and cruel kind of punishment; the judgment in which case was, that the man or woman should be remanded to prison, and laid there in some low dark room, where they should lie naked on the bare earth, without any litter, rushes, or other clothings, and without any garment about them, but some thing to cover their privy parts; and that they should lie upon their backs, their heads uncovered, and their feet and one arm to be drawn to one quarter of the room with a cord, and the other arm to another quarter, and in the same manner to be done with their legs; and there should be laid upon their bodies iron and stone, so much as they might bear, and more; and the next day following to have three morsels of barley bread, without any drink, and the second day to drink thrice of the water next to the house of the prison (except running water) without any bread, and this to be their diet till they were dead. So as upon the matter, they should die three manner of ways, by weight, by famine, and by cold. And the reason of this terrible judgment was, because they refused to stand to the common law of the land. (2 *Inst.* 178, 179.) This punishment was called, *paine fort et dure*, and is not to be inflicted until a jury is impannelled to try whether he stands mute *from the visitation of God*. (2 *Hawk.* 329.) But this is to be understood of such felony for which he is not to have his clergy; otherwise, if he stands mute, he shall have his clergy. *Moor.* 550.

By the laws of Virginia, "whensoever, in treason or felony, any person shall stand mute on his arraignment, or persists, after being admonished by the court, in not answering to the indictment, or in peremptorily challenging above the number of jurors which by law he may be allowed to challenge peremptorily, or shall be out-lawed, he shall be considered as convicted, and the same judgment, execution, and disabilities, shall take place and be awarded, as if he had been convicted by verdict, or confession of the crime." 1 *Rev. Code*, p. 104, sect. 18.



## NE EXEAT.

1. THIS is a writ, as the name imports, to restrain the defendant from avoiding the plaintiff's demand, by quitting the commonwealth. *Miltf.* 46. *Cooper's Equity Pleading*, 13.

2. It was originally a high prerogative writ, applicable to state purposes (1 *Bl. Com.* 137, 266.) though afterwards applied to cases of private right; yet such application is ever received with great caution and jealousy, and, except in the instances of alimony, is confined to cases of equitable debt. *Coop.* Introduction, xxxiv.

3. This writ is not granted where the demand is at law; for there the plaintiff has bail, and he ought not to have double bail, both at law and in equity. *Wyatt's Prac. Reg.* 291.

4. The plaintiff must swear positively, that the defendant is indebted to him in a certain sum, or the writ cannot be indorsed; and state good grounds for the suggestion, that he means to abscond, or the motion for a *ne exeat* cannot be granted; if the bill be for an account only, and the plaintiff swears, that he verily believes the balance in his favour will amount to so much, it will be sufficient. *Wy. Prac. Reg.* 291.

5. It is an abuse of this process to break open doors and take the party in bed; but yet the court would not order him, for this cause, to be set at liberty. *Ibid.* 290.

6. If the party be taken, what is generally done is this: the party either gives security by bond, in such sum as is demanded, or he satisfies the court by answering (where the answer is not already in) or by affidavit, that he designs not to go out of the commonwealth, and gives such security as the court directs, and then he is discharged. *Ibid.*

7. A surety in a *ne exeat* is not to be discharged upon the defendant's putting in his answer, not even after a decree against the defendant, and commitment decreed against him; for if there be no danger of the defendant's going beyond sea, being in prison, then the surety is in no danger. *Ibid.* 291.

8. It lies for a defendant, in an account against a co-defendant. *Ibid.*

9. This writ was granted against a married woman, executrix, the defendant, her husband having left the country, and taken away his effects. *Ibid.*

10. It was refused for the wife against her husband, in respect of a demand arising by virtue of a marriage settlement, whereby the defendant obliged himself to secure a sum of money out of his real and personal estate, as a provision for his wife, in case she survived him: as the contingency might never happen. *Ibid.*

11. A *ne exeat* never can be granted, but upon a *clear* demand, and no equity can arise here from a contract *legally* satisfied in a country where it arose. *Ibid.* 292. 1 *Bro. Ch. Ca.* 376. 3 *Bro. Ch. Ca.* 218.

12. The affidavit of the wife, in support of an application for a *ne exeat* against her husband, cannot be received. *Wy. Prac. Reg.* 292. 3 *Bro. Ch. Ca.* 11. 1 *Ves. jr.* 49.

13. If it appear to the court, that a bill for a *ne exeat* must be dismissed for want of parties, the motion for a *ne exeat* will be refused. *Wy. Prac. Reg.* 292. 3 *Bro. Ch. Ca.* 23.

14. A writ of *ne exeat*, which was obtained by one inhabitant of *Antigua* against another, upon a bond stated in the bill to have been lost, was *discharged*, on giving security to abide the decree. *Wy. Prac. Reg.* 292. 3 *Bro. Ch. Ca.* 218.

15. Where the plaintiff has *two* demands on the defendant, the one liquidated, the other matter of account, the writ of *ne exeat* shall be marked for the former demand only. *Wy. Prac. Reg.* 292. 3 *Bro. Ch. Ca.* 427.

16. A *ne exeat* was discharged, upon paying into court the sum for which it was indorsed. *Wy. Prac. Reg.* 292. 1 *Ves. jr.* 96.

☞ The power of granting writs of *ne exeat* has long been exercised by the superior courts of chancery in Virginia, and the practice in proceeding on them has been regulated by several statutes; but this power was never expressly given to the county and corporation courts till the session of 1809.

## I. OF WRITS OF *NE EXEAT*, IN THE SUPERIOR COURTS OF CHANCERY.

1. The superior courts of chancery shall be considered as always open, so as to grant injunctions, writs of *ne exeat*, certiorari, and other process, heretofore usually granted in vacation. (1 *Rev. Code*, p. 64, sect. 9.) And the judge may *discharge* writs of *ne exeat* in vacation, as in term time: *provided*, that the party moving for the discharge of any such writ shall give to the party who obtained it, reasonable notice of the time when such motion will be made. 1 *Rev. Code*, p. 375, sect. 4.

2. Writs of *ne exeat* shall not be granted, but upon a bill filed and affidavits made to the truth of its allegations, which being produced to the court in term time, or the judge in vacation, such writ may be granted or refused, as shall seem just; and if granted, he shall direct to be indorsed thereon in what penalty, bond, and security, shall be required of the defendant. 1 *Rev. Code*, p. 67, sect. 52.

3. If the defendant shall, by answer, satisfy the court that there is no reason for his restraint, or give sufficient security to perform the decree, the writ may be discharged. *Ibid.* p. 68, sect. 53.

## II. OF WRITS OF *NE EXEAT*, IN THE INFERIOR COURTS.

1. By act of the eighth of February, 1810 (*Sess. Acts of 1809*, ch. 17, p. 19.) the several county and corporation courts within this common-

wealth, at their monthly and quarterly sessions, shall have the same power to grant writs of *ne exeat*, to prevent the departure of any defendant out of the county, till security be given for performing the decree of the court, as is now given to the superior courts of chancery in term time, and to be exercised in the same manner.

2. Any two justices of the peace of a county or corporation, when the court is not sitting, shall have the same power of awarding writs of *ne exeat*, as is now exercised by the judges of the superior courts of chancery in vacation.

3. That on application to an inferior court whilst in session, or to two of the members thereof in vacation, it shall be the duty of the said court, or of the two justices in vacation, to require of the applicant bond, with sufficient security, in a sum at least double the amount of the debt, or value of the thing claimed. That the court, when in session shall, by order, fix the penalty of the said bond, and in vacation the justices shall by their indorsement on the affidavit required by this act, in like manner ascertain the penalty in which the bond is to be taken. That it shall be the duty of the clerks of the respective county and corporation courts, to take the said bond, when sufficient security is offered, and on the applicant's complying with the provisions of this act, the clerk of the said court shall furnish to him a writ of *ne exeat*, in the following form :

"The commonwealth of Virginia, to the sheriff or coroner of county (or sergeant of the city, corporation, or borough of ) greeting: Whereas it is represented to the court of the county of or to the court of the city or borough of (as the case may be) or to two of the members of one of the aforesaid courts, viz. A B and C D, two justices or aldermen (as the case may be) on the part of E F, in a suit instituted by him against G H, defendant, that the said G H designs quickly to leave this commonwealth, as by oath made in that behalf appears, which tends to the great prejudice and damage of the said E F, therefore, in order to prevent this injustice, you are hereby commanded, that you do without delay cause the said G H to come before you, and give sufficient bail or security in the sum of that he will not go, or attempt to go, out of the limits of this commonwealth, without the leave of our said court, or performing such decree as may be made in the suit aforesaid ; and in case the said G H shall refuse to give such bail or security, then you are to commit him to the jail of your county, city, or borough (as the case may be) there to be kept in safe custody until he shall do so of his own accord ; and when you have taken such security, you are forthwith to make and return a certificate thereof to the justices of our said court, distinctly and plainly, under your seal, together with this writ. Witness, &c.

4. The clerks of the county and other inferior courts of this commonwealth, for performing the several duties required by this act, shall be allowed the same fees as the clerks of the superior courts of chancery receive for similar services.

5. And to prevent oppression and delay, the court to which the proceedings on a writ of *ne exeat*, granted by two magistrates, may be returned, shall have full power to revise and controul the judgment of the said magistrates, and to affirm or to reverse their decision, as to the

propriety of having awarded such writ. All questions concerning writs of *ne exeat* granted in vacation shall be among the first motions concerning civil business acted on by the court, without regard to their order on the docket. *Sess. Acts, 1809, ch. 17, p. 19, 20.*

*(A) Bond to be given by the complainant, on obtaining a writ of ne exeat.*

Know all men by these presents, that we, A P and B S, are held and firmly bound to C D, in the sum of \* of lawful money of Virginia, to be paid to the said B D, his certain attorney, his executors, administrators, or assigns; for the true payment whereof we bind ourselves jointly and severally, our joint and several heirs, executors, and administrators, firmly by these presents, sealed with our seals, and dated this            day of            in the year

The condition of the above obligation is such, that whereas the above bound A P hath obtained from the court of            county (or from J P and K P, two of the justices of the peace for the county of            as the case may be) the commonwealth's writ of *ne exeat re publica*, to prevent the aforesaid B D from departing this commonwealth, or to oblige him to give bond and security, in the penalty of            to answer such decree as shall hereafter be made by the court of            county, in a suit in chancery now depending in the said court, between the said A P, complainant, and the said B D, defendant. Now if the said A P shall satisfy and pay unto the said B D, all such damages and costs, as the said B D shall sustain by occasion of the issuing of the writ aforesaid, in case the same shall be discharged, then the above obligation to be void, else to remain in full force.

Signed, sealed, and delivered, }  
in presence of }

*(B) Bond to be given by the defendant.*

*(The penalty is the same as in the above form (A) only making the obligation payable, by the defendant and his security, to the complainant.)*

The condition of the above obligation is such, that whereas the above named A P hath obtained from the court of the county of            (or from J P and K P, two of the justices of the peace for the county of            as the case may be) the commonwealth's writ of *ne exeat re publica*, to the sheriff of            county directed, commanding him, that, without delay, he cause the said A D to come before him, and give sufficient bail or security, in the sum of            that he would not go, or attempt to go, out of the limits of this commonwealth, without the

\* The penalty of the bond is in the sum which the plaintiff is allowed by the court, or justices, to fix for the defendant. Whatever sum the plaintiff claims of the defendant, and in whatever amount the defendant is compelled to give security, to answer the decree of the court, the plaintiff must give bond, in the same penalty, to satisfy all such costs and damages as may be sustained by suing out the writ of *ne exeat*. This was the practice adopted by the late chancellor (Mr. Wythe) and the author is enabled to say, that it is the practice of his successor, Mr. Taylor.

leave of the said court of                      or performing such decree as may be made by the said court, in a suit instituted therein by the said A P, against the said C D; which writ hath been duly executed by D S, a deputy for H S, sheriff of the said county of                      on the body of the said C D, who thereupon tendered the above bound B S as security, in compliance with the requisition of the said writ. Now, if the said C D shall not go, or attempt to go, out of the limits of this commonwealth, without the leave of the aforesaid court, or performing such decree as may be made in the suit instituted in the said court by the said A P, against the said C D, then the above obligation to be void, otherwise to remain in full force.

Signed, sealed, and }  
delivered, &c. }

NOTE....Besides the writ of *ne exeat*, which regularly acts upon the person, the court will in some cases award an injunction, to restrain the defendant from conveying his property out of the state. This is particularly necessary in the case of slaves, or where the property is of such a kind that it may easily be sent away, and thus the effect of a decree be eluded, although the defendant himself may remain within the commonwealth.

(C) *Bond to be given by the defendant, on executing an injunction to restrain him from carrying property out of the state.*

(The penalty as in form (A) only substituting the defendant for the plaintiff.)

The condition of the above obligation is such, that whereas in a suit now depending in the court of                      between A P, complainant, and C D, defendant, a writ of injunction hath been awarded by the said court, among other things, to inhibit the above bound C D from removing, or causing to be removed, or sent out of the limits of the commonwealth of Virginia, certain property, to wit (*describe it particularly*) now in the possession of the said C D (*if held in right of dower, or other qualified interest, express it*) until the further order of the said court. Now if the said C D shall stand to, abide, and perform the final decree which may be made in the said cause, then the above obligation to be void, otherwise to remain in full force and virtue.

Signed, sealed, &c.

# NUISANCE.

## I. What it is. II. How it may be removed, III. How punished.

### I. WHAT IT IS.

1. A COMMON nuisance seems to be an offence against the public, either by doing a thing which tends to the annoyance of all the commonwealth's citizens, or by neglecting to do a thing which the common good requires. 1 *Haw.* 197. 4 *Bl. Com.* 166.

2. Annoyances to the prejudice of particular persons are not punishable by a public prosecution as common nuisances, but are left to be redressed by the private actions of the parties aggrieved by them. 1 *Haw.* 197.

3. Where note a diversity between a *private* and a *public* nuisance : If it is a *private* nuisance, he shall have his action upon his case, and recover his damages ; but if it is a *public* nuisance, he shall not have his action upon his case, and this the law hath provided for avoiding of multiplicity of suits, for if any one might have an action, all men might have the like ; but the law for this common nuisance hath provided an apt remedy, by presentment or indictment, at the suit of the commonwealth, in the behalf of all its citizens ; unless any man hath a particular damage, as if he and his horse fall into a ditch made across a highway, whereby he received hurt and loss, there for this special damage, which is not common to others, he shall have an action upon his case. 1 *Inst.* 56.

4. And from hence it clearly follows, that no indictment for a nuisance can be good, which lays it to the damage of private persons only : as, where it accuses a man of surcharging such a common ; or of inclosing such a piece of ground, wherein the inhabitants of such a town have a right of common, to the nuisance of all the inhabitants of such a town, or of disturbing a watercourse running to such a mill, to the damage of such a person and his tenants, without saying of all citizens of the commonwealth. 1 *Haw.* 197.

5. Yet it hath been said, that an indictment of a common scold is good, although it conclude, to the common nuisance of *divers*, instead of all the commonwealth's citizens ; perhaps for this reason (says Mr. Hawkins) because a common scold cannot but be a common nuisance. *Ibid.* 198.

6. And if the law be so in this case, why should not an indictment, setting forth a nuisance to a way, and expressly and unexceptionably shewing it to be a highway, be good, notwithstanding it conclude, to the nuisance of *divers*, without saying all the commonwealth's citizens.

And perhaps the authorities which seem to contradict this opinion might go upon this reason, that in the body of the indictment it did not appear with sufficient certainty, whether the way wherein the nuisance was alledged were a highway, or only a private way, and therefore that it shall be intended from the conclusion of the indictment, that it was a private way. 1 *Haw.* 198.

7. There is no doubt but that common bawdy-houses are indictable as common nuisances; and it hath been said that all common stages for rope dancers, and also all common gaming houses, are nuisances in the eye of the law, not only because they are great temptations to idleness, but also, because they are apt to draw great numbers of disorderly persons. 1 *Haw.* 198.

8. Also, it hath been holden, that a common playhouse may be a nuisance, if it draw together such a number of coaches or people, as prove generally inconvenient to the places adjacent. 1 *Haw.* 198.

9. Erecting a shed so near a man's house that it stops up his lights is not a nuisance for which an action will lie, unless the house is an ancient house, and the lights ancient lights. 2 *Salk.* 459.

10. Also, stopping a prospect is not a nuisance. 3 *Salk.* 247.

11. A gate erected in a highway, where none had been before, is a common nuisance. 1 *Haw.* 199.

12. A person was indicted for making great noise in the night with a speaking trumpet, to the disturbance of the neighbourhood; and it was held by the court to be a nuisance. *Str.* 704.

13. Two persons were indicted for making great quantities of *nuisance, offensive and stinking liquors*, called acid spirit of sulphur, oil of vitriol, and oil of aqua fortis; whereby the air was impregnated with noisome and offensive smells; and it was held by the court to be a nuisance. The word *noisome* comes in the place of the Latin *nocivus*; and means not only disagreeable, but hurtful. And lord *Manefield* said, it is not necessary, to constitute the offence, that the smell should be unwholesome; it is enough if it renders the enjoyment of life and property uncomfortable. *Burr.* 333.

14. A *glass house*, or *swine yard*, may be indicted as a nuisance. And, according to Mr. *Hawkins*, a *brew house*, and the making candles in a town, so as to make it offensive to the neighbourhood. 1 *Haw.* 199.

15. If a man has a *dog* that kills sheep, that is not a public nuisance, but the owner of the dog (knowing thereof) is liable to an action; but if he is ignorant of such quality, he shall not be punished for this killing; and in an action on the case for such killing, the plaintiff shall be required to prove in evidence, that the dog had used to kill sheep. *Dyer* 25. *Het.* 171.

16. If a man hath an unruly *horse* in his stable, and leaves open the door, whereby the horse gets forth and doth mischief, an action lies against the master. 1 *Vent.* 295.

17. In the case of *Buxenden and Sharp*. The plaintiff declared, that the defendant kept a *bull* that used to run at men, but did not say that the defendant *knew* of this quality; it was adjudged that an action did not lie, unless it did appear that the owner knew of this quality. 2 *Salk.* 662.

## II. HOW IT MAY BE REMOVED.

1. It seemeth to be certain that any one may pull down or otherwise destroy a common nuisance, as a new gate, or even a new house erected in a highway, or the like, for if one whose estate is or may be prejudiced by a private nuisance actually erected, as a house hanging over his ground, or stopping his lights, may justify the entering into another's ground, and pulling down and destroying such a nuisance, whether it were erected before or since he came to the estate, it cannot but follow a *fortiori*, that any one may lawfully destroy a common nuisance. And as the law is now holden, it seems that in a plea, justifying the removal of the nuisance, a man need not shew that he did as little damage as might be. 1 *Haw.* 199.

2. But although he may remove the nuisance, yet he cannot remove the materials, or convert them to his own use. *Dalt. c.* 50.

## III. HOW PUNISHED.

1. It is said that a common scold is punishable after conviction, upon indictment, by being put into the cucking stool. (1 *Haw.* 200.) Or, vulgarly, the ducking stool.

Note. *Cuck* or *guck* in the Saxon tongue (according to lord Coke) signifieth to scold or brawl; taken from the bird *cuckow*, or *guckhaw*; and *ing* in that language signifieth water; because a scolding woman was for her punishment sowed in the water. (3 *Inst.* 219.) The common people in the northern parts of England, amongst whom the the greatest remains of the ancient Saxon are to be found, pronounce it *ducking stool*; which perhaps may have sprung from the *Belgic* or *Teutonic ducken*, to dive under water; from whence also, probably, we denominate our duck the water fowl; or rather, it is more agreeable to the analogy and progression of languages, to assert, that the substantive *duck* is the original, and the verb made from thence; as much as to say, that to *duck* is to do as that fowl does. 3 *Burn's Just.* 241.

2. And she may be convicted without setting forth the particulars in the indictment. 2 *Haw.* 227.

Nevertheless, the offence must be set forth with convenient certainty; and the indictment must conclude, not only against the peace, but to the common nuisance of divers of the commonwealth's citizens. In the case of *K. and Margaret Cooper*, she was convicted on an indictment, for being a common and turbulent brawler, and sower of discord amongst her honest and quiet neighbours, so that she hath stirred, moved, and incited divers strifes, controversies, quarrels and disputes amongst his majesty's liege people, against the peace, &c. It was moved in arrest of judgment, that the charge was too general, and did not amount to being either a barrator or common scold, which are the only instances in which a general charge will be sufficient. It was likewise objected, that if the words did amount to a description of a scold, yet it should be laid to be to the common nuisance of her neighbours, for every degree of scolding is not indictable. And the court was of opinion, that the judgment ought to be arrested, on both exceptions; for none of the words here used are the technical words, and it must be laid to be to the common nuisance. *Sir.* 1246.



## NUISANCE.

3. There is no doubt, but whoever is convicted of another nuisance may be fined and imprisoned; and it is said, that one convicted of a nuisance done to the commonwealth's highway may be commanded by the judgment to remove the nuisance at his own costs; and it seemeth to be reasonable, that those who are convicted of any other common nuisance shall also have the like judgment. 1 *Haw.* 200. *Str.* 686.

4. And the defendant shall not be allowed to make any objections against the indictment, until he hath pleaded to it. *Dalt.* c. 66.

5. And the court never admits a person convicted of a nuisance to a small fine, until proof is made of the nuisance being removed. *Dalt.* c. 66.

6. A master is indictable for a nuisance done by his servant. *L. Raym.* 264.

7. There are also many other offences declared to be nuisances by particular statutes, which are treated of under the titles to which they respectively belong.

### *General indictment for a nuisance.*

county, to wit.

The jurors, &c. upon their oath present, that A O, late of in the county of yeoman, on the day of in the year and on divers other days and times, as well before as afterwards, with force and arms, at in the said county (*here set forth the nuisance*) and the same (*nuisance*) so as aforesaid done, doth yet continue and suffer to remain; to the common nuisance of all the citizens of the said commonwealth, to the evil example of all others in the like case offending, and against the peace and dignity of the commonwealth.

### *Indictment against a butcher for using his shop as a slaughter-house in a public market.*

county, to wit.

The jurors for the commonwealth upon their oath present, that H H, late of butcher, on the day of in the year and on divers other days and times then before, at to wit, in the parish of in aforesaid, in a certain shop of him the said H H, situate and being in a common market there called market (the said market being a common passage for all the citizens of the said commonwealth, with their goods, chattels, and merchandises to go, return, pass and repass, at their free will and pleasure) did unlawfully and injuriously kill and slay, and cause to be killed and slain, ten lambs, and the excrements, blood, entrails, and other filth coming from the said lambs, did then, and on the said other days and times respectively, there cause and permit to lie and remain in the said shop for a long time, to wit, for the space of five hours, on each of those days, whereby divers filthy and unwholesome smells and stench, from the excrements, blood, entrails, and other filth coming from the lambs aforesaid, then, and on the said other days and times respectively, there

did arise, and the air there was thereby greatly corrupted and infected, to the great damage and common nuisance, not only of all the lawful citizens of the said commonwealth near there inhabiting and dwelling, but also of all other the citizens of the said commonwealth, in, by, and through the said common market and passage going, returning, passing, repassing, and labouring, to the evil example of all others in the like case offending, and against the peace and dignity of the commonwealth.

For an indictment for a nuisance in obstructing a public road, see title **ROADS**.

☞ See other forms of indictments for nuisances in *Cro. Cir. Compt.* title **NUISANCE**; and *Cro. Cir. Assistant*, p. 362, 404.

## OATHS.

*I. Of oaths in general. II. What solemnities may be used instead of oaths. III. Oaths of infidels.*

### I. OF OATHS IN GENERAL.

1. OATH is a corruption of the Saxon word *eoþ*. 3 *Inst.* 165.

2. It is called a corporal oath, because the person lays his hand upon some part of the scriptures when he takes it. 3 *Inst.* 165.

3. If the oath be taken on the common prayer book, which hath the epistles and gospels, it is good enough, and perjury upon the statute may be assigned upon this oath. 2 *Keck.* 314.

4. The words, *so help me God*, in the common form of an oath, perhaps may have been first used in the very ancient manner of trial by battle in England, or at least are delivered with a peculiar emphasis in that solemnity; wherein the appellee lays his right hand on the book, and with his left hand takes the appellant by the right, and swears to this effect. Hear this, thou who callest thyself John by the name of baptism, whom I hold by the hand, that falsely upon me thou has lied; and for this thou liest, that I, who call myself Thomas by the name of baptism, did not feloniously murder thy father W, by name

So help me God (and then he kisses the book and says) and that I will defend against thee by my body, as this court shall award. And so the appellant is sworn in like manner.

[Where we observe also the genuine foundation, as it seemeth, of the word *ſo* being still esteemed so great an affront above all others, as, whenever it is pronounced, to cause an immediate affray and bloodshed.]

5. Where an oath is administered by a person that hath lawful authority to tender the same, and it be afterwards broken, yet if it be not in a judicial proceeding, it is no perjury, nor punishable by the common law. 3 *Inst.* 166.

6 Therefore, if one call another a *perjured* man, he may have an action upon the case, because it shall be intended to be contrary to his oath in a judicial proceeding; but for calling one a *forsworn* man, no action lies; because the forswearing may be extrajudicial, and consequently no perjury in law. 3 *Inst.* 166.

As to the form of oaths to be taken by different public officers, see 1st & 2d vol. *Rev. Code*, index, title OATHS.

The oath administered to a witness, on a trial, generally is, 'The evidence which you shall give in the case now depending between A B, plaintiff, and C D, defendant, shall be the truth, the whole truth, and nothing but the truth. So help you God.' And then kisses the book.

*If to answer questions, upon an examination.*

'You shall true answer make to such questions as shall be propounded to you, relative to the matter now before me' (or the court, if depending in court.)

As to *affirmations*, the party affirming has a right to prescribe his own form.

## II. WHAT SOLEMNITIES MAY BE USED INSTEAD OF OATHS.

By an act of May session, 1779, ch. 7 (1 vol. *Rev. Code*, p. 55, sect. 8) a person, who, from religious scruples, refused to take an oath, might be qualified according to the solemnity used by the church of which he professed to be a member; but the act of 1806 goes still further, and permits a person to use the solemnity and ceremony, and repeat the formulary, which, *in his own opinion*, ought to be observed. 'Any person refusing to take an oath in the manner the same hath heretofore been usually administered, and declaring religious scruples to be the true and only reason of such refusal, if he or she shall use the solemnity and ceremony, and repeat the formulary observed on similar occasions, by those of the church or religious society of which such person professed himself or herself to be a member, or to join in communion with, or shall use the solemnity and ceremony, and repeat the formulary which, in his or her opinion, is or ought to be observed on such occasions, according to the religion in which such person professeth to believe, he or she shall thereupon be deemed as competent a witness, or be as duly qualified to execute an office, or perform any other act, to the sanction whereof an oath is or shall be required by law, and shall be subject to the same rules, derive the same advantages, or incur the same penalties or forfeitures, as if he or she had sworn.'

## III. OATHS OF INFIDELS.

A Jew is to be sworn on the old testament, and perjury upon the statute may be assigned upon this oath. 2 *Keb.* 314.

Upon error in debt upon a bond, the bail being both Jews, were suffered to put on their hats while they took the oath. *Str.* 821.

At the council, Dec. 9, 1738. Present the two chief justices. On a complaint of *Jacob Fachina* against general *Sabine* as governor of Gibraltar, alderman *Ben Monso*, a Moor, was produced as a witness, and sworn upon the *Koran*. *Str.* 1104.

So in the case of *Omickund* against *Barker*, in the court of chancery, the depositions of several persons who were heathens of the *Gentou* religion, sworn after their own country manner, were admitted to be read. 2 *Eq. Cas. Abr.* 397. 1 *Atk.* 21.

So a *Muhametan* may be sworn on the *Alcoran*, in a prosecution for a capital offence. *Leph* 58.

## ORDINARIES.

THE term *ordinary* was very early adopted in Virginia, to signify what in law is called an *inn*, and is now commonly called a *tavern*, or *public house*. Ordinary-keepers were at first licensed by the governor (see 1 *Stat. at large*, 287) but afterwards by the county courts (*Ibid.* 471) which continues to be the case at the present day. See 1 *Rev. Code*, ch. 107, p. 202, *as to licensing and regulating the rates of taverns, &c.* Also, *acts of* 1809, ch. 12, sect. 3, p. 13. *As to gaming in taverns*, see 1 *Rev. Code*, p. 204, 373. 2 *Rev. Code*, ch. 15, p. 13.

*Warrant for taking more than the legal rates, on sect. 3, of 1 Rev. Code, p. 203.*

county, to wit.

Whereas complaint is this day made to me, J P, a justice of the peace for this county, by A J, that on the       day of       last past, A O, of       an ordinary keeper in this county, did demand and take from him the said A J, a greater price for drink, diet, &c. (as the case may be) than is allowed by the rates established by the court of this county. These are, therefore, to require you to summon the said A O to appear before me, or some other justice of the peace for this county, to shew cause why the penalty of twelve dollars should not be levied upon him, for the said offence, according to law. Given, &c.

By the 7th section of the act (1 *Rev. Code*, p. 203) 'Every justice of the peace is required and strictly enjoined to cause this act to be put in strict execution within his county.'

' And if any justice, either from information, his own knowledge, or other just cause, shall suspect any person of keeping a tippling house, or retailing liquors, as aforesaid, he is hereby empowered, and required to summon such person to appear before him, together with such witnesses as he may judge necessary; and upon the person's appearing, or failing to appear, if the justice, upon examining the witnesses upon oath, shall find sufficient cause, he may, and is hereby required to direct the attorney for the commonwealth in such county to institute a prosecution against such person on the public behalf, which such attorney is hereby required to institute accordingly. And such justice may also cause the person so suspected to give bond, with two sufficient securities, for his or her good behaviour, for the term of one year, the principal in the sum of one hundred and fifty dollars, and the securities in the sum of seventy-five dollars each; and upon failing to give such bond and security within three days after being thereto required, such person may be committed to the jail of the county, there to remain until he or she shall give bond and security accordingly, and if such person shall afterwards, during the said term, keep a tippling house, or retail liquors as aforesaid, the same shall be, and is hereby declared a breach of good behaviour, and of the condition of such bond.'

*(A) Summons to bring a person suspected of keeping a tippling house, or retailing spirituous liquors, without license, before a magistrate.*

to wit.

Whereas I have just cause to suspect, from my own knowledge (or from the information of A J) that A O, of this county, doth keep a tippling house (or doth retail spirituous liquors without license first had and obtained, as required by law.) These are, therefore, to require you, in the name of the commonwealth, to summon the said A O, to appear before me, at on the day of next, to answer the premises, and further to be dealt with according to law. And summon also A W, B W, &c. to appear as witnesses, on behalf of the commonwealth in this case, at the time and place above mentioned. Given under my hand and seal, &c.

To constable.

*(B) Recognizance.*

(The recognizance may be in the form (A) under title RECOGNIZANCE, the principal in 150 dollars, and the securities in 75 dollars each) with the following condition.

The condition of this recognizance is such, that whereas the above bound A O, hath been duly convicted before J P, one of the commonwealth's justices of the peace for the county of for keeping a tippling house (or retailing spirituous liquors without license) within the said county, within months last past, contrary to the act of the General Assembly in that case made and provided. Now if the said A O shall be of good behaviour for and during the term of one

year, next ensuing the date hereof, then the above recognizance to be void, else to remain in full force.

*(C) Mittimus for want of sureties.*

to wit.

To constable, and to the keeper of the jail in the said county. Whereas, on the            day of            last past, A O of this county, labourer, was duly convicted before me, J P, one of the commonwealth's justices of the peace for the said county, by the oaths of A W, B W, &c. of keeping a tippling house (or retailing spirituous liquors without license) within the county aforesaid, within months last past, contrary to the act of the General Assembly in that case made and provided; and the said A O having failed, within three days after the date of the conviction aforesaid, to enter into a recognizance, with two sufficient securities, himself in the sum of one hundred and fifty dollars, and his securities in the sum of seventy-five dollars each, for the said A O being of the good behaviour for the term of one year, thence next ensuing; and the said A O now before me having refused to find such securities. These are, therefore, in the name of the commonwealth, to command you the said constable forthwith to convey the said A O to the jail of this county, and to deliver him to the keeper there, together with this precept. And I do, in the name of the said commonwealth, hereby command you the said keeper to receive the said A O into your custody, in the said jail, and him there safely to keep, until he shall find such securities as aforesaid. Given under my hand and seal, &c.

*(D) Directions to the attorney for the commonwealth, to institute a prosecution against the keeper of a tippling house, or a retailer of liquors without license.*

to wit.

Whereas upon the examination of A W, B W, &c. this day taken upon oath before me, J P, one of the commonwealth's justices of the peace for this county, it appears to me that A O, of the county of aforesaid, is guilty of keeping a tippling house (or of retailing spirituous liquors without license.) These are, therefore, in the name of the commonwealth, and by virtue of the powers to me given, by the seventh section of the act of the General Assembly, entitled 'An act to regulate ordinaries, and restraint of tippling houses,' to require you to institute a prosecution against the said A O, on the public behalf. Given, &c.

To A A, Esq. attorney for the com- }  
monwealth, in the county of        }

ORPHANS. See APPRENTICES.

OVERSEERS OF THE POOR. See POOR.

## PARDON.

1. A PARDON is a work of mercy, whereby the executive, either before the attainder, sentence or conviction, or after, forgiveth any crime, offence, punishment, execution, right, title, debt, or duty, temporal or ecclesiastical. 3 *Inst.* 233, 5 *Co.* 110. b.

2. Pardons are either *general* or *special*. General are by act of Assembly; of which, if they are without exceptions, the court must take notice *ex officio*; but if there are exceptions therein, the party must aver that he is none of the persons excepted. 3 *Inst.* 233. *Hale's Pl.* 252.

3. Special pardons are either *of course*, as to persons convicted of manslaughter, or *se defendendo*, and by divers statutes to those who shall discover their accomplices in several felonies; or, of *grace*, which are by the executive's charter, of which the court cannot take notice *ex officio*, but they must be pleaded. 3 *Inst.* 233.

4. The executive cannot pardon an offence before it is committed; but such pardon is void. 2 *Haw.* 389.

5. As the release of the party will not bar an indictment at the suit of the commonwealth; so neither will a pardon by the executive be any bar to an appeal at the suit of the party. 2 *Haw.* 392.

6. And in some cases, even where the commonwealth is sole party, some things there are which it cannot pardon; as for example, for all common nuisances, as for not repairing of bridges or highways, the suit (for avoiding multiplicity of suits) is given to the commonwealth only, for redress and reformation thereof; but the executive cannot pardon or discharge either the nuisance, or the suit for the same, because such pardon would take away the only means of compelling a redress of it. But it hath been holden by some, that a pardon of such an offence will save the party from any fine, for the time precedent to the crime. 3 *Inst.* 237. 2 *Haw.* 391.

7. Thus also, if one be bound by recognizance to the governor, to keep the peace against another by name, and generally all other citizens of the commonwealth; in this case, before the peace be broken, the governor cannot discharge or release the recognizance, although it be made only to him, because it is for the benefit and safety of the citizens generally. 3 *Inst.* 238.

8. Likewise, after an action popular is brought, as well for the commonwealth as for the informer, according to any statute; the commonwealth can but discharge its own part, and cannot discharge the informer's part; because, by bringing of the action, the informer hath an interest therein; but before the action is brought, the executive may discharge the whole (unless it be provided to the contrary by the act) because the informer cannot bring an action or information ori-

ginally for his part only, but must pursue the statute. And if the action be given to the *party grieved*, the executive cannot discharge the same. 3 *Inst.* 231.

9. It seems to be settled at this day, that the pardon of treason or felony, even after a conviction or attainder, doth so far clear the party from the infamy and all other consequences of his crime, that he may not only have an action for a scandal, in calling him traitor or felon, after the time of the pardon, but may also be a good witness, notwithstanding the attainder or conviction, because the pardon, as it were, makes him a new man, and gives him a new capacity and credit. 2 *Haw.* 395. 4 *Bl. Com.* 395.

10. But it seems to be the better opinion, that the pardon of a conviction of *perjury* doth not so restore the party to his credit, as to make him a good witness; because it would be an injury to the people in general, to make them subject to such a person's testimony. 1 *Vent.* 349.

And by the laws of this commonwealth, a person convicted of perjury is for ever disabled from being a witness. *See title EVIDENCE.*

11. After a criminal has been burnt in the hand, the punishment operates as a pardon, and he becomes a good witness. *Raym.* 370. *See Clergy.*

12. A pardon may be conditional, on the performance of which the validity of the pardon will depend. 4 *Bl. Com.* 394.

13. Every pardon ought to mention the offence particularly. 2 *Hawk.* 383.

14. No pardon of felony shall be carried further than the express purport of it. 2 *Hawk.* 383.

14. No pardon can operate so as to bar any right, whether of entry or action, or any legal interest, benefit, or advantage whatsoever, before vested in the citizen. 2 *Hawk.* 392.

## PARTITION.

PARTITION of estates between tenants in common matters of *account* and *dower*, are cases in which courts of equity will entertain jurisdiction, though a remedy might be had in a court of law. *Miff. Pl.* 109.

By the laws of *Virginia*, joint tenants and tenants in common, may be compelled to make partition, by writs *de partitione facienda*, the forms whereof shall be devised in the general court. 1 *Rev Code*, ch. 24, p. 31.

For other matters relating to partitions and joint rights and obligations, see the above law.



## PARTNERSHIP.

1. PARTNERSHIP is a voluntary contract between two or more persons, for joining together their money, goods, labour and skill, or either or all of them, upon an agreement that the gain or loss shall be divided proportionally between them, and having for its object the advancement and protection of fair and open trade. *Watson's L. P.* 1.

2. A man cannot be liable as a partner, where there has not either been a contract between him and the ostensible person to share jointly in the profits and loss, nor has he permitted the other to make use of his credit, and to hold him out as one jointly liable. *Wats. L. P.* 11. *Doug.* 371.

3. To make a person liable as a partner, there must be an agreement to share in all risks of profit or loss. If many employ a common agent (as a broker) for a particular purpose, who makes a joint purchase, this shall not make them partners, so that they can be used as such. It is essential, therefore, to make a person subject as a partner, that he is interested in the profits; that is, that the advantage which he derives from the trade is casual, as depending on these profits; for if it is certain and defined, it is a mere loan, and he is not a partner. *2 Bl. Rep.* 998. 9.

4. A dormant partner, when discovered, is liable, because he would otherwise receive usurious interest without any risk. *Per L. Mansfield, Doug.* 371.

5. The liability of partners is not obviated by an agreement among themselves, that neither shall be answerable for the acts or losses of the other. *2 H. Bl.* 235.

6. Partners are considered either as tenants in common of the partnership effects, or joint tenants without benefit of survivorship. (*Wats. L. P.* 65.) They are most frequently considered in the latter sense by law writers. Thus, Lord Coke says, as to the doctrine of survivorship, that 'an exception is to be made of two joint merchants; for the wares, merchandise, debts, or duties, that they have as joint merchants or partners, shall not survive, but shall go to the executors of him that deceaseth; and this is by the law of merchants, which is part of the law of the land.' *Co. Lit.* 182.

7. But though the interest does not survive to the surviving partner, yet the right of action does; and as the surviving partner is liable for the joint debts, he has an exclusive controul over the partnership effects. (*Wats. L. P.* 267. (364.) And therefore a payment to an executor or administrator of a deceased partner can be no satisfaction to a surviving partner, who has the sole right of suing for, and of receiving the monies due to the company. *1 Dall.* 250.

8. But if the surviving partner will not, within a reasonable time, account with the representatives of the deceased partner, a court of chancery will grant an injunction to restrain him from disposing of the joint stock, and receiving the outstanding debts. 8 *Ves. jr.* 317.

9. Upon the death of one partner, his representatives become tenants in common with the survivor of all partnership effects in possession. *Wats. L. P.* 266 (363.)

10. And the survivor is to be sued alone by the partnership creditors. An executor of the deceased partner and the survivor cannot be jointly sued; because the first is to be charged *de bonis testatoris*, and the other *de bonis propriis*. *Wats. L. P.* 269 (366.) *Tayl. Ref.* 124.

11. A surviving partner is liable to the full extent of partnership effects, for joint debt; but if a separate creditor of the deceased partner would have satisfaction out of the partnership effects, in the hands of the surviving partner, all the partnership debts must be first paid, and he can never be liable to such separate creditor, but in respect of the surplus. *Wats. L. P.* 269 (367.)


12. In an action founded on contract for a partnership demand, *all the partners should be made plaintiffs*; and if this be not done, the defendant may take advantage of it at the trial, and non-suit the plaintiff. (2 *Str.* 820. *Bull. N. P.* 152.) But in the case of *torts*, it must be pleaded in abatement. (2 *Str.* 820.) Yet after a *severance*, one alone may sue. *Wats. L. P.* 310 (420.)

13. If an action be brought against one of several partners upon a joint contract, the defendant must plead in abatement, and cannot otherwise take advantage of the objection. (5 *Burr.* 2611. 2 *W. Bl. Ref.* 947. 1 *Wash.* 9.) But where one partner is not amenable to the process of the court, the plaintiff may proceed singly against the other. 2 *Atk.* 519.

14. All contracts with partners are *joint and several*; every partner is liable to pay the *whole*; in what proportion the others shall contribute is a matter merely among themselves. *Per L. Mansfield, in Rice v. Shute.* 5 *Burr.* 2611.

15. In actions of *tort* for an injury to the partnership effects, all the partners should regularly join. *Wats. L. P.* 313 (424.)

16. But if several partners jointly commit a *tort*, the plaintiff has his election to sue all or any number of the parties; as in action *ex delicto*, such as trespass, trover, case for malfeasance, and the like. And advantage cannot be taken either by plea in abatement, or bar, nor can it be given in evidence on the general issue. *Wats. L. P.* 313 (424.)

17.  As to the power of part owners of ships to send them to sea, the mode of effecting it, and the consequences resulting therefrom, see *Wats. L. P.* 65 (89) and the cases there cited.

18. Under a *fiery facias* against the goods of one of two or more partners, the sheriff should sell only an undivided moiety of the partnership effects. (1 *Salk.* 392.) And the vendee, if a stranger, will only succeed to the share due to the defendant upon a balance being struck; thus preventing the defendant from being the means of carrying out of the partnership funds, more than he is himself entitled to. *Wats. L. P.* 73, 74 (100.)

19. And courts of equity will relieve against the effects of an execution upon the partnership effects, by awarding an injunction, and directing an account to be taken; on the principle, that the interest of each partner, in partnership effects, is only what remains after the partnership accounts are settled. *Wats. L. P.* 74 (101.)

20. In an action brought by one partner (after the dissolution of the partnership) another may be called as a witness to prove the debt paid to him. *Pea. Ca. N. P.* 21.

21. It is incumbent on persons dissolving a partnership to send notice of such dissolution to all the persons with whom they had dealings as partners. A publication in a gazette is not of itself sufficient notice, as many people never see one. Actual notice must be brought home to the creditor, or the partners will be liable to the action of a creditor who did not know of the dissolution. *Pea. Ca. N. P.* 154. *Ibid.* 42.

22. But a notice of a dissolution of a partnership published in a gazette, is sufficient to all persons who have had no previous dealings with the partnership. 2 *Johns.* 300.

23. In the course of trade, the act of one partner is the act of the whole; but one partner cannot bind another by deed. 7 *Term. Rep.* 207. 1 *Dall.* 121. 2 *Johns.* 213. 1 *H. & M.* 423.

24. A debt due from an individual partner cannot be set off against a partnership demand. 1 *Wash.* 79. 1 *H. & M.* 176. *S. P.*

## PAYMENT.

1. In the application of payments, it is to be observed, that he who pays money has the first right to direct to what purpose it shall be applied. But if the person paying the money does not at the time direct to what demand it shall be applied, the receiver may apply it to any demand which he may have against the payer in his own right. 2 *Str.* 1194. *Goddard v. Cor.* *Bull. N. P.* 174. 5 *Rep.* 117.

2. But if the creditor have claims against the debtor, as executor or administrator, and also, in his own right, and the debtor make payments generally on account, no part of them can be applied to discharge the demand against the debtor as executor or administrator; for the validity of the demand may depend on the question of assets and the manner of administering them. *Ibid.*

3. When one is to pay rent at a certain day, he has all that day until night to pay it, but so that the receiver may see to count it. And when a person appoints no place of payment of his rent, the law ap-

points it to be upon the land (at the most notorious place, which is held to be the front door of the dwelling house. *Co. Lit.* 201. b.) If a man is bound in an obligation to pay his rent *at a day*, he must seek out his landlord to pay him. *Wood's Inst.* B. 2. c. 2. p. 187. 5 *Rep.* 114. *Co. Lit.* 202. a. 4 *Rep.* 72, 73.

4. If a debtor be directed by his creditor to remit money by the post, and it be lost, the creditor must bear the loss. And even if there be no direction, where the money is received and remitted as *agent*, the loss will fall on the creditor. (*Peake's Ca. N. P.* 67.) But in these cases the person remitting ought to use due caution, and deliver the letter at the post-office, and not to a bell-man in the street. *Peake's Ca. N. P.* 186.

5. A cannot, by the *voluntary* payment of B's debt, raise an *assumpsit* against B. But if it be paid by *request* or on *compulsion*, it is otherwise. 8 *Term. Rep.* 310.

6. Payment to an attorney at law is good, on the custom of the country, particularly if he have possession of the specialty. Under particular circumstances it might be otherwise, as if notice were given that no such power was vested in the attorney. 1 *Wash.* 10.

7. The receipt of one thing in satisfaction of another is a good payment; as the acceptance of a horse in lieu of a sum of money; or of a bond by a third person in discharge of a prior obligation. 1 *Dall.* 217.

## PENITENTIARY.

THE penitentiary system was adopted in Virginia, by an act passed at the December Session, 1796, but it did not go into operation till the twenty-fifth of March, 1800, when the governor, by proclamation, and in pursuance of the last section of the original act (which was suspended till the buildings could be completed) declared the law to be in force. In order to exhibit the changes which experience has suggested, the original and subsequent acts, on this subject, are inserted, to which notes are annexed, pointing out the variations which have, from time to time, been made.

☞ It must afford real pleasure to the friends of humanity throughout the world, to be informed, that no institution was ever in a more prosperous state, than the penitentiary of Virginia at present.

## CHAP. I.

(See 1 Rev. Code, ch. 200, p. 355.)

*An act to amend the penal laws of this commonwealth, passed December fifteenth, 1796.*

Sect. 1. Be it enacted, that no crime whatsoever, committed by any free person against this commonwealth (except murder of the first degree) shall be punished with death within the same. (a.)

Sect. 2. And whereas the several offences, which are included under the general denomination of murder, differ so greatly from each other in the degree of their atrociousness, that it is unjust to involve them in the same punishment. Be it further enacted, that all murder which shall be perpetrated by means of poison, or by lying in wait, or by any other kind of wilful, deliberate, and premeditated killing, or which shall be committed in the perpetration, or attempt to perpetrate, any arson, rape, robbery, or burglary, shall be deemed murder of the first degree; and all other kinds of murder shall be deemed murder of the second degree; (b) and the jury before whom any person indicted for murder shall be tried shall, if they find such person guilty thereof, ascertain in their verdict, whether it be murder in the first or second degree; but if such person shall be convicted by confession, the court shall proceed by examination of witnesses to determine the degree of the crime; and to give sentence accordingly.

Sect. 3. And be it further enacted, that every person liable to be prosecuted for petit treason, shall in future be indicted, proceeded against, and punished, as is directed in other kinds of murder.

Sect. 4. Every person duly convicted of the crime of high treason, (c) shall be sentenced to undergo a confinement in the jail and penitentiary house, herein after mentioned, for a period not less than six nor more than twelve years, and shall be kept therein at hard labour or in solitude, and shall in all things be treated and dealt with as is herein after directed. Every person duly convicted of the crime of arson, (d) or as being an accessory thereto, shall be sentenced to undergo a similar confinement for a period not less than five, nor more than twelve years, under the same conditions as are herein after directed. Every person duly convicted of the crime of rape, or as being accessory thereto before the fact, shall be sentenced to undergo a similar confinement, for a period of time not less than ten years, nor more than twenty-one years, under the same conditions as are herein after directed. Every person duly convicted of the crime of murder, in the second degree, shall be sentenced to undergo a similar confinement for a period not less than five years, nor more than eighteen years, under the same conditions as are herein after directed.

(a) The punishment of death has since been extended to high treason, by act of 1802 (see 2 Rev. Code, p. 16, sect. 3. *post* ch. 5.) to house burning in a town, by act of 1804 (*ibid.* p. 80, sect. 7. *post* ch. 10.) and to arson, by the last mentioned act. *Ibid.* sect. 8.

(b) Murder in the first and second degrees further defined, by act of 1802. See 2 Rev. Code, ch. 16, p. 16, sect. 1. *post* ch. 6.

(c) High treason is now punishable with death. See note (a) to sect. 1.

(d) Arson, by act of 1805 (2 Rev. Code, ch. 41, sect. 1, p. 70. *post* ch. 9.) was declared to be punishable by confinement in the penitentiary, for a term not less than ten, nor more than twenty-one years; but it is now punishable with death. See note (a) to sect. 1.

Sect. 5. Every person convicted of robbery (e) or burglary (e) or as accessory thereto before the fact, shall restore the thing robbed or taken, to the owner or owners thereof, or shall pay to him, her or them, the full value thereof, and be sentenced, to undergo a similar confinement, for a period not less than three, nor more than ten years, under the same conditions as are herein after directed.

Sect. 6. Every person convicted of horse stealing (e) or as accessory thereto before the fact, shall restore the horse, mare, or gelding stolen, to the owner or owners thereof, or shall pay to him, her, or them, the full value thereof, and also undergo a similar confinement, for a period not less than two nor more than seven years, under the same conditions as are herein after directed. Every person convicted of simple larceny to the value of four dollars and upwards, or as accessory thereto before the fact, shall restore the goods or chattels so stolen to the right owner or owners thereof, or shall pay to him, her or them, the full value thereof, or so much thereof as shall not be restored; and moreover, shall undergo a similar confinement, for a period not less than one, nor more than three years, under the same conditions as are herein after directed.

Sect. 7. If any person shall feloniously take, steal, and carry away, any goods or chattels under the value of four dollars, the same order and course of trial shall be had and observed as for other simple larcenies, and he, she, or they, being thereof legally convicted, shall be deemed guilty of petty larceny (f) and shall restore the goods and chattels so stolen, or pay the full value thereof to the owner or owners thereof, and be further sentenced to undergo a similar confinement, for a period not less than six months, nor more than one year, under the same conditions as are herein after expressed.

Sect. 8. Robbery or larceny\* of obligations or bonds, bills obligatory, bills of exchange, promissory notes for the payment of money, lottery tickets, paper bills of credit, certificates granted by or under the authority of this commonwealth, or of the United States, or any of them, shall be punished in the same manner as robbery or larceny of goods and chattels.

Sect. 9. Every person who shall be convicted of having falsely forged and counterfeited any gold or silver coin, which now is, or hereafter shall be passing or in circulation within this state, or of having falsely uttered, paid, or tendered in payment, any such counterfeit and forged coin, knowing the same to be forged and counterfeited, or having aided, abetted, or commanded the perpetration of either of the said crimes, or shall be concerned in printing, signing, or passing any counterfeit notes of the banks of Alexandria or the United States, (g) knowing them to be such, or altering any genuine notes of either

(e) Robbery, burglary, and horse stealing, are now punishable by confinement in the penitentiary, for a term not less than five nor more than ten years. See act of 1803, 2 Rev. Code, ch. 41, sect. 1, p. 70, *post*, ch. 9.

(f) Persons guilty of petty larceny are now to be tried in the county courts. See act of 1803 (2 Rev. Code, ch. 41, sect. 4, p. 70, *post*, ch. 9.) which, as to the mode of trial, refers to act of 1802 (2 Rev. Code, ch. 21, sect. 3, 4, p. 24, *post*, ch. 7.) and on conviction shall be punished with stripes, not less than ten nor more than forty, or by confinement in the penitentiary for not less than eighteen months, at the discretion of the jury. 2 Rev. Code, ch. 41, sect. 4, p. 70.

\* As to robbery or larceny of bank or post notes, see 2 Rev. Code, ch. 91, sect. 3, p. 119.

(g) As to counterfeiting notes of the bank of Virginia, see act of 1804. 2 Rev. Code, ch. 53, sect. 5, 6, p. 80, *post*, ch. 10.

For the offences of obtaining notes or money from the bank of Virginia, by means of a forged check or order, or of counterfeiting the seal of the bank, or of theft or robbery in bank notes, see act of 1806, 2 Rev. Code, ch. 91, p. 118, *post*, ch. 11.

of the said banks, shall be sentenced to undergo a confinement in the jail and penitentiary house, herein after mentioned, not less than four nor more than fifteen years, and shall be kept, treated, and dealt with in manner herein after directed, and shall also pay such fine as the court shall adjudge, not exceeding one thousand dollars.

Sect. 10. Whosoever, on purpose and of malice aforethought, by lying in wait, shall unlawfully cut out or disable the tongue, put out an eye, slit the nose, cut off the nose, ear, or lip, or cut off or disable any limb or member of another, with intention in so doing to maim or disfigure such person, or shall voluntarily, maliciously, and of purpose, pull or put out an eye while fighting or otherwise, every such offender, his or her aiders, abettors, and counsellors, shall be sentenced to undergo a confinement in the said jail and penitentiary house, for any time not less than two nor more than ten years, and shall be kept, treated, and dealt with, in manner herein after mentioned; and shall also pay a fine, not exceeding one thousand dollars, three-fourths whereof shall be for the use of the party grieved.\*

Sect. 11. Whosoever shall be convicted of any voluntary manslaughter shall be sentenced to undergo an imprisonment, at hard labour, and solitary confinement, in the said jail and penitentiary house, for any time not less than two nor more than ten years, and to give security for his or her good behaviour during life, or for any less time, according to the nature and enormity of the offence; and for the second offence shall be sentenced to undergo an imprisonment, at hard labour and solitary confinement, in the said jail and penitentiary house, for any time not less than six nor more than fourteen years.

Sect. 12. Whosoever any person shall be charged with involuntary manslaughter, happening in consequence of an unlawful act, it shall and may be lawful for the attorney general, or other person prosecuting the pleas of the commonwealth, with the leave of the court, to waive the felony, and to proceed against and charge such person with a misdemeanor, and to give in evidence any act or acts of manslaughter; and such person or persons, on conviction, shall be fined or imprisoned, as in cases of misdemeanor; or the said attorney general, or other person prosecuting the pleas of the commonwealth, may charge both offences in the same indictment, in which case, the jury may acquit the party of one, and find him or her guilty of the other charge.

Sect. 13. All claims to dispensation from punishment, by benefit of clergy, shall be and are hereby for ever abolished; and every person convicted of any felony heretofore deemed clergyable, shall undergo an imprisonment at hard labour and solitary confinement in the said jail and penitentiary house, for any time not less than six months, and not more than two years, and shall be treated and dealt with as is directed hereafter, except in those cases where some other specific penalty is prescribed by this act.†

Sect. 14. Every person convicted of murder of the first degree, his or her aiders, abettors, and counsellors, shall suffer death by hanging by the neck.

\* See title *Maiming*, where all the laws on this subject are collected.

† See title *Clergy* [benefit of].

Sect. 15. The jury before whom any offender may be tried shall decide upon, and in their verdict ascertain the time within the respective periods prescribed, during which such offenders shall undergo confinement in the jail and penitentiary house, herein after mentioned, according to the directions of this act.

Sect. 16. Every other felony, misdemeanor, or offence whatsoever, not provided for by this act, may and shall be punished as heretofore. (h)

Sect. 17. The executive of this commonwealth are hereby requested, as soon as may be, to cause as much land, in or near the city of Richmond, to be purchased for the use of the commonwealth, as will be sufficient for the building of a jail and penitentiary house, which shall be constructed of brick or stone, upon such plan as will best prevent danger from fire, and sufficient to contain, with convenience, two hundred convicts at least, with a yard sufficiently capacious adjoining thereto, for the said convicts occasionally to walk about and labour in, which said yard shall be surrounded by walls of such height, as, without unnecessary exclusion of air, will be sufficient to prevent the escape of the prisoners.

Sect. 18. The executive are hereby also requested to cause a suitable number of cells to be constructed in the yard of the said jail, each of which cells shall be six feet in width, eight feet in length, and nine feet in height, and shall be constructed of brick or stone, upon such plan as will best prevent danger from fire, and the said cells shall be separated from the common yard, by walls of such height, as, without unnecessary exclusion of air and light, will prevent all external communication, for the purpose of confining therein the offenders who may be sentenced to solitary confinement by virtue of this act.

Sect. 19. And for the purpose of defraying the expence of purchasing such land, and of erecting such jail, cells and walls, the governor, by and with the advice of council, shall be, and is hereby authorised, from time to time, to draw from the treasury a sum, not exceeding thirty thousand dollars, to be paid out of any monies which may be in the treasury unappropriated to other purposes, and shall from time to time cause to be laid before the General Assembly an account of the expenditure of the same.

Sect. 20. The said jail and cells shall be appropriated to the purpose of confining such males and females as shall have been convicted of the offences above enumerated, as punishable with imprisonment and labour, but the males and females are hereby required to be kept separate and apart from each other; and all the prisoners shall be subject to the visitation and superintendence of the inspectors (i) herein after appointed.

Sect. 21. Every person convicted in any district court in this state, of any crime (except murder of the first degree) herein before specified, shall, as soon as possible after conviction, be safely removed and conveyed by the sheriff of the county or sergeant of the corporation in which the crime or offence shall have been committed, and at the

(h) By act of 1799 (1 Rev. Code, p. 402, post. ch. 2.) all offences not within the benefit of clergy, and unprovided for by this act, are punishable by confinement in the penitentiary, for a term not less than one nor more than ten years.

(i) By act of 1806 (2 Rev. Code, ch. 111, p. 140, post. ch. 12.) the board of inspectors is abolished, and the powers vested in them transferred to the executive.



## PENITENTIARY.

expense of the commonwealth, to the said jail and penitentiary house, (k) and therein be kept during the term of their confinement, in the manner and on the terms herein after mentioned. And every sheriff or sergeant, who shall neglect to remove and safely deliver at the jail aforesaid such convict, shall forfeit and pay the sum of one hundred dollars, to be recovered in any court of record, and applied, one half to the use of the county or corporation where the offence was committed, the other to such person as shall sue for the same.

Sect. 22. Every person convicted of any of the crimes aforesaid, and who shall be confined in the jail and penitentiary house aforesaid, shall be placed and kept in the solitary cells thereof, on low and coarse diet, for such part or portion of the term of his or her imprisonment, as the court in their sentence shall direct and appoint: Provided, that it be not more than one half, nor less than one twelfth part thereof; and that the inspectors (l) of the said jail shall have power to direct the infliction of the said solitary confinement, at such intervals, and in such manner, as they shall judge best.

Sect. 23. And whereas it is of importance that the nature of the offence, and the former conduct and character of the convicts should be known by the said inspectors (l) Be it further enacted, that whenever any person shall be convicted of any crime, which now is capital, or a felony of death, the court, before whom such conviction is had, shall, before their adjournment to another term, make and cause to be transmitted to the said inspectors a report, or short account of the circumstances attending the crime committed by such convict, particularly such as tend to aggravate or extenuate the same, and also what character the said convict appeared on the trial to sustain, and whether he had any time before been convicted of any felony or other infamous crime; which report the said inspectors shall cause to be entered in books or registers to be provided for that purpose.

Sect. 24. If any person convicted of any crime, which now is capital, or a felony of death without benefit of clergy, shall commit any such offence a second time, and be thereof legally convicted, he or she shall be sentenced to undergo an imprisonment in the said jail and penitentiary house, at hard labour, during life, and shall be confined in the said solitary cells, at such times and in such manner as the inspectors shall direct; and if any person sentenced to hard labour and solitary confinement, by virtue of this act, shall escape, or be pardoned, and after his or her escape or pardon shall be guilty of any such offence again which is capital, or felony of death without benefit of clergy, such person shall be sentenced to undergo an imprisonment for the term of twenty-five years, and shall be confined in the solitary cells aforesaid, at the discretion of the said inspectors.

Sect. 25. If any person after this act shall, by proclamation of the governor, as herein after mentioned,\* be declared in force, be convicted of any crime, committed before the said day, he or she shall be sentenced to undergo such pains and punishment, as by the laws now in force are prescribed and directed, unless such convict shall openly

(k) Further regulations concerning the conveyance of prisoners to the penitentiary, by act of 1800. (1 *Rev. Code*, p. 410. part. ch. 3.) The convict may be conveyed by such sheriff as the court may think proper. *Ibid.* sect. 5.

(l) See note (i) to sect. 20.

\* See note (y) to section 45, as to the time when this act went into operation.

pray the court, before whom such conviction shall be had, that sentence may be pronounced agreeably to the provisions of this act for the like offence; in which case the said court shall comply with the said prayer, and pass such sentence on such convict, as they would have passed, had the said offence been committed subsequent to the said day.

Sect. 26. No person indicted for any crime, the punishment whereof is altered by this act, shall lose any peremptory challenge, to which he or she would have been entitled, had this act not been passed; nor be liable to be tried in any other courts than those in which they now are or may be tried for the same offences.

Sect. 27. In order to prevent the introduction of contagious disorders, every person who shall be ordered to hard labour in the said jail shall be separately lodged, washed and cleaned; and shall continue in such separate lodging, until it shall be certified by some physician, that he or she is fit to be received among the other prisoners, and the clothes in which such person shall then be clothed shall either be burnt, or, at the discretion of two of the said inspectors (1) be baked, fumigated, or carefully laid by, until the expiration of the term for which such offender shall be sentenced to hard labour, to be then returned to him or her.

Sect. 28. All such convicts shall, at the public expence, during the term of their confinement, be clothed in habits of coarse materials, uniform in colour and make, and distinguishing them from the good citizens of this commonwealth; and the males shall have their heads and beards close shaven, at least once in every week, and all such offenders shall, during the said term, be sustained upon bread, Indian meal, or other inferior food, at the discretion of the said inspectors, (1) and shall be allowed two meals of coarse meat in each week, and shall be kept, as far as may be consistent with their sex, age, health, and ability, to labour of the hardest and most servile kind, in which the work is least liable to be spoiled by ignorance, neglect, or obstinacy, and where the materials are not easily embezzled or destroyed; and if the work to be performed is of such a nature as may require previous instruction, proper persons for that purpose, to whom a suitable allowance shall be made, shall be provided, by order of any two of the inspectors (1) hereafter named; during which labour the said offenders shall be kept separate and apart from each other, if the nature of their several employments will admit thereof, and where the nature of such employment requires two or more to work together, the keeper of the said jail, or one of his deputies, shall, if possible, be constantly present.\*

Sect. 29. Such offenders, unless prevented by ill health, shall be employed in work every day in the year, except Sundays, and such days when they shall be confined in the solitary cells; and the hours of work in each day shall be as many as the season of the year, with an interval of half an hour for breakfast, and an hour for dinner, will permit, but not exceeding eight hours in the months of November, December, and January; nine hours in the months of February and

(1) See note (1) to sect. 20.

\* See *Rules and Regulations*, 18, 19, as to the food and raiment of the prisoners.

October, and ten hours in the rest of the year; and when such hours of work are past, the working tools, implements and materials, or such of them, as will admit of daily removal, shall be removed to places proper for their safe custody, until the hour of labour shall return.

Sect. 30. The keeper of the said jail shall, from time to time, with the approbation of any two of the inspectors (m) herein after mentioned, provide a sufficient quantity of stock and materials, working tools and implements for such offenders, for the expence of which the said inspectors, or any two of them, shall be, and they are hereby authorised to draw orders, to be countersigned by the auditor of public accounts, on the treasurer of this commonwealth, if need shall be, specifying in such orders the quantity and nature of the materials, tools, or implements wanted, which order the said treasurer is hereby required to discharge, out of any money which may be at the time in the treasury; for which materials, tools, and implements, when received, the said keeper shall be accountable; and the said keeper shall, with the approbation of any two of the said inspectors, have power to make contracts with any person whatever, for the clothing, diet, and all other necessities, for the maintenance and support of such convicts, and for the implements and materials of any kind of manufacture, trade or labour, in which such convicts shall be employed, and for the sale of such goods, wares and merchandises, as shall be there wrought and manufactured; and the said keeper shall cause all accounts concerning the maintenance of such convicts and other prisoners to be entered regularly in a book or books, to be kept for that purpose, and shall also keep separate accounts of the stock and materials so wrought, manufactured, sold and disposed of, and the monies for which the same shall be sold, and when sold, and to whom, in books to be provided for those purposes; all which books and accounts shall be at all times open for the examination of the said inspectors, and shall be regularly laid before them at their quarterly or other meetings, as herein after is directed, for their approbation and allowance.

Sect. 31. If the said inspectors, (n) at their quarterly or other meetings, shall suspect any fraudulent or improper charges, or any omission in any such accounts, they may examine, upon oath or affirmation, the said keeper or any of his deputies, servants or assistants, or any person of whom any necessities, stock, materials or other things, have been purchased for the use of the said jail, or any persons to whom any stock or materials wrought or manufactured therein have been sold, or any of the offenders confined in such jail, or any other person or persons, concerning any of the articles contained in such accounts, or any omission thereof, and in case any fraud shall appear in such accounts, the particulars thereof shall be reported by the said inspectors, to the mayor of the city of Richmond, for the purposes herein after mentioned.

(m) The powers, by this section vested in the inspectors, having been expressly transferred to the executive, by act of 1806, (2 Rev. Code, ch. 111, p. 140. post. ch. 13.) By an advice of council, of the thirty-first of January, 1807, an agent has been appointed, to reside in the city of Richmond, whose duty it is to purchase all the raw materials necessary for the use of the penitentiary.

(n) See note (i) to sect. 20.

Sect. 32. In order to encourage industry as an evidence of reformation, separate accounts (o) shall be opened in the said books for all convicts sentenced to hard labour for six months and upwards, in which such convicts shall be charged with the expences of clothing and subsistence, and such proportionable part of the expences of the raw materials upon which they shall be employed, as the inspectors at their quarterly or other meetings shall think just, and shall be credited with the sum or sums from time to time received by reason of their labour, and if the same shall be found to exceed the said expences, the said excess shall be laid out in decent raiment for such convicts at their discharge, or otherwise applied to their use and benefit, as the said inspectors shall upon such occasions direct; and if such offender, at the end or other determination of his term of confinement, shall labour under any acute or dangerous distemper, he shall not be discharged, unless at his own request, until he can be safely discharged.

Sect. 33. No person whatever, except the keeper, his deputies, servants or assistants, the said inspectors, officers and ministers of justice, ministers of the gospel, or persons producing a written license, signed by two of the said inspectors, (p) shall be permitted to enter within the walls where such offenders shall be confined; and the doors of all the lodging rooms and cells in the said jail shall be locked, and all light therein extinguished, at the hour of nine; and one or more watchmen shall patrol the said jail at least twice in every hour from that time until the return of the time of labour in the morning of the next day.

Sect. 34. The walls of the cells and apartments in the said jail shall be whitewashed with lime and water, at least twice in every year, and the floors of the said cells and apartments shall be washed once every week, or oftener, if the said inspectors shall so direct, by one or more of the said prisoners in rotation, who, at the discretion of the said keeper, shall have an extra allowance of diet for so doing; and the said prisoners shall be allowed to walk and air themselves for such stated time as their health may require, and the said keeper shall permit; and if proper employment can be found, such prisoners may also be permitted, with the approbation of two of the said inspectors (q) to work in the yard, provided such airing and working in the yard be in the presence or within the view of the said keeper, or his deputies or assistants.

Sect. 35. One or more of the apartments in the second story of the said jail, and at the extreme end of the west wing, shall be fitted up as an infirmary, and in case any such offender, being sick, shall, upon examination of a physician, be found to require it, he or she shall be removed to the infirmary, and his or her name shall be entered in a book to be kept for that purpose, and when such physician shall report to the said keeper that such offender is in a proper condition to quit the infirmary, and return to his or her employment, such report shall be entered by the said keeper, in a book to be kept for that pur-

(o) So much of this act as directs that separate accounts shall be kept between the commonwealth and prisoners, was repealed by act of 1803 (2 Rev. Code, ch. 41, sect. 3, p. 70, post chap. 9) and the inspectors (now the executive) may allow a prisoner, on his discharge, a sum not exceeding thirty dollars.

(p) Under the general powers vested in the governor and council, by the act of 1806 (2 Rev. Code, ch. 114, p. 140, post ch. 13) the executive, by advice of council of the 23d and 31st of January, 1807, have directed that permits to visit the penitentiary may be granted by a member of the executive, or any one of the visitors to be appointed by the advice of the last mentioned date.

(q) See note (i) to sect. 30.

pose, and the said-keeper shall order him or her back to his or her former labour, so far as the same shall be consistent with his or her state of health; and the mayor and aldermen of the city of Richmond shall from time to time appoint a physician to attend the said jail. (r)

Sect. 36. The keeper of the said jail shall have power to punish all such prisoners guilty of assaults within the said jail, when no dangerous wound or bruise is given, profane-cursing and swearing, or indecent behaviour, idleness or negligence in work, or wilful mismanagement of it, or of disobedience to the orders or regulations herein after directed to be made, by confining such offenders in the solitary cells of the said jail, and by keeping them upon bread and water only, for any term not exceeding two days;\* and if any such prisoner shall be guilty of any offence within the said jail, which the said keeper is not hereby authorised to punish, or for which he shall think the said punishment is not sufficient, by reason of the enormity of the offence, he shall report the same to two of the said inspectors, who, if upon proper inquiry they shall think fit, shall certify the nature and circumstances of such offence, with the name of the offender, to the mayor of the city of Richmond, and the mayor shall thereupon order such offences to be punished by moderate whipping, or repeated whippings, not exceeding thirteen lashes each, or by close confinement in the said solitary cells, with bread and water only for sustenance, for any time not exceeding six days, or by all the said punishments. (s)

Sect. 37. It shall be lawful for the governor, with the advice of council, to appoint a suitable person to be keeper of the said jail, who shall however be liable to be removed whenever occasion may require, in which case another shall, from time to time be appointed in like manner, who shall receive as full a compensation for his services, and in lieu of all fees and gratuities, by reason or under colour of the said office, so much as the governor with the advice of council, at the time such appointment shall be made, shall direct, to be paid in quarterly payments,\* by orders drawn on the treasury of this commonwealth by the auditor of public accounts, and also five per centum (t) on the sales of all articles manufactured by the said criminals; and such keeper shall have power, with the approbation of the governor and council, to appoint a suitable number of deputies and assistants, at such reasonable allowances as the governor with the advice of council shall think just, which allowances shall be paid quarterly in like manner; and before any such jailor shall exercise any part of the said

(r) By act of 1806 (1 Rev. Code, ch. 284, sect. 3, p. 414. post ch. 5) the duties required by this act to be performed by the court of the city of Richmond, are to be performed by the executive. By act of 1801 (3 Rev. Code, Appendix, No. 26, p. 175) the executive were authorised to appoint a surgeon to the public guard, and penitentiary and was allowed a salary of four hundred dollars per annum, which was increased one hundred dollars by act of 1804. (3 Rev. Code, Appendix, No. 13, p. 176.) By act of 1806 (3 Rev. Code, ch. 14, sect. 6, p. 141. post ch. 12) his salary was fixed at five hundred dollars per annum, to commence from the first day of January, 1807.

(s) By article third of the rules and regulations, not exceeding ten days for the first offence, nor fifteen days for the second, without the approbation of the executive.

(t) So much of this act as requires the intervention of the inspectors and mayor of the city of Richmond being repealed by act of 1806 (3 Rev. Code, ch. 111, p. 140. post ch. 12) the executive, by an advice of council of the 23d of January, 1807, have vested the keeper with the power of inflicting punishments not exceeding those limited by law.

(u) This allowance of a commission to the keeper repealed by act of 1806 (3 Rev. Code, ch. 126, sect. 4, p. 140. post ch. 12) and the executive authorised to contract with the keeper or others, and to make any reasonable allowance, &c. See advice of council of the 31st of January, 1807, for the appointment of an agent to the penitentiary, &c. and ascertaining the commissions of the keeper and his assistants.

\* The executive, by advice of council of the 25th of March, 1800, fixed the salary of the keeper of the penitentiary at twelve hundred dollars per annum. By act of 1801 (1 Rev. Code, p. 438) the same salary was allowed; and a salary of 200 dollars and 60 cents given to the turnkey. By act of 1803 (3 Rev. Code, p. 71) the same salaries are continued to the keeper and turnkey of the penitentiary, and over a salary of 250 dollars per annum is provided for each assistant keeper.

office, he shall give bond to the governor of the commonwealth, with two sufficient sureties, to be approved by the court of the city of Richmond, in the sum of two thousand dollars, upon condition that he, his deputies, and assistants, shall well and faithfully perform the trusts and duties in them reposed; which said bond, being executed before, and certified by the said court, shall be recorded therein, and copies thereof, attested by the clerk of the said court, shall be legal evidence in all courts of law in any suit against such jailor or his deputies.

Sect. 38. It shall be lawful for the said court of the city of Richmond, at the first court after the time when the said jail shall be erected, agreeably to the directions of this act, to appoint twelve inspectors, six of whom shall be in office for six months, and six for twelve months, and so during every succeeding six months, six inspectors shall be appointed by the said court, who shall be in office for twelve months; and if any person so appointed, not having a reasonable excuse, to be approved of by the said court, shall refuse to serve in the said office, he shall forfeit and pay the sum of thirty dollars; to be recovered by action of debt, the one half to the use of the person suing, the other half to be paid to the treasurer of this commonwealth; to be applied to the purposes herein before mentioned. (v)

Sect. 39. The said inspectors, seven of whom shall be a quorum, shall meet once in three months in an apartment to be provided for that purpose in the said jail, and may be specially convened by the two acting inspectors when occasion shall require; and they shall, at their first meeting, appoint two of their members to be acting inspectors, who shall continue such for such time as shall be directed by the said inspectors, or a majority of them, when met together. And the acting inspectors shall attend the said jail at least once in each week, and shall examine into and inspect the management of the said jail, and the conduct of the said keeper and his deputies; so far as respects the said offenders employed at hard labour by the direction of this act, and shall do and perform the several matters and things herein before directed by them to be performed. (v) ...

Sect. 40. The board of inspectors, at their quarterly or other meeting, shall make such other and further orders and regulations for the purpose of carrying this act into execution, as shall be approved of by the executive; and such orders and regulations shall be hung up in at least six of the most conspicuous places in the said jail; and if the said keeper or any of his deputies or assistants shall obstruct or resist the said inspectors, or any of them, in the exercise of the powers and duties vested in them by this act, such person shall forfeit and pay the sum of sixty dollars, to be recovered as aforesaid, and shall moreover be liable to be removed in manner aforesaid from his respective office or employment in the said jail. (w)

(u) See note (i) to sect. 30, and note (r) to sect. 35, by which it appears that the office of inspectors has been abolished, and the powers by this act vested in them delegated to the executive. With a view to obtain the advice and assistance of experienced persons, particularly in relation to the interior operations of the penitentiary, a board consisting of twelve visitors has been appointed. Gentlemen of the highest respectability have consented to act, their recommendations have been treated with the highest respect by the executive, and the happiest results have flowed from their co-operation.

(v) See advice of council of 31st January, 1807, for the appointment of twelve visitors.  
(w) By act of 1803 (2 Rev. Code, ch. 41, sect. 5, p. 70, post ch. 9) the inspectors of the penitentiary, the governor and council, and attorney general, were to constitute a board to form rules and regulations for the internal government of the penitentiary; but this was repealed by act of 1806 (3 Rev. Code, ch. 91, sect. 1, p. 140, post ch. 13) and the power of making rules for the government of the penitentiary vested in the governor and council. *Ibid.* sect. 3.

Sect. 41. The said keeper of the jail, his deputies and assistants, in case any of the said offenders shall escape from confinement without the knowledge or consent of the said keeper, his deputies or assistants, shall forfeit and pay the sum of thirty dollars, to be recovered and applied in manner aforesaid. Provided, that nothing in this act contained shall be deemed or taken to extend to escapes voluntarily suffered by the keeper of the said jail.

Sect. 42. If any such offender, sentenced to hard labour, shall escape, he or she shall, on conviction thereof, suffer such additional confinement and hard labour, agreeably to the directions of this act, and shall also suffer such additional corporal punishment, not extending to life or limb, as the court in which such offender shall have been convicted shall adjudge and direct. (x)

Sect. 43. If the jailor, or any other person, shall introduce into, or give away, barter, or sell within the said jail, any spirituous or fermented liquors, except only such as the said keeper shall make use of in his own family, or such as may be required for any prisoner in a state of ill health, and for such purpose prescribed by an attending physician, and delivered into the hands of such physician, or other person appointed to receive them, such person shall forfeit and pay the sum of twenty dollars, one moiety whereof to the use of the person suing, the other moiety to be paid to the said inspectors, for the purposes in this act contained.

Sect. 44. All acts and parts of acts coming within the purview of this act, shall, on the operation of this act, be thereby repealed.

Sect. 45. So much of this act as respects the purchase of land, and building thereon the above mentioned jail and cells, shall commence and be in force from the passing thereof. The other parts thereof shall remain suspended in their operation until the governor, by the advice of council, shall issue his proclamation, declaring the said jail to be in a situation fit to receive offenders, when the said other parts of this act shall commence and be in operation. (y)

## CHAP. II.

(See 1 Rev. Code, ch. 264, p. 402.)

*An act supplemental to the act to amend the penal laws of this commonwealth, passed January twenty-fifth, 1800.*

Sect. 1. From and after the period when the act, entitled 'An act to amend the penal laws of this commonwealth,' shall commence and be in full force and operation, if any free person shall be convicted (either as principal or accessory) of any felony or offence whatsoever, not already provided for by the said recited act, the punishment whereof, by the laws in force at and before the commencement of the said recited act, may amount to death, without the benefit of clergy, every such offender from whom the benefit of clergy would have been taken away, shall be sentenced to undergo a confinement in the jail and penitentiary house, established by the said recited act, for a period not less than

(x) The trial of prisoners for escapes is now to be had in the district court of Richmond. See act of 1803- 2 Rev. Code, ch. 41, sect. 3, p. 70, *post* ch. 9.)

(y) The executive by proclamation bearing date the 25th of March, 1800, declared the whole of this law to be in operation.

one, nor more than ten years, and shall be kept therein at hard labour, or in solitude, and in all other respects be treated as in and by the said recited act is directed.\*

Sect 2. And whereas the method heretofore observed in calling courts for the examination and trial of criminals in the counties and corporations of this commonwealth, (z) has been found inconvenient and expensive, and sometimes to obstruct public justice. For remedy whereof, Be it further enacted and declared by the General Assembly, That hereafter when any free person or slave shall be committed to jail, by any justice of the peace of any county or corporation, for examination or trial, and the court summoned by the sheriff for the examination or trial of such free person or slave shall fail to meet as heretofore prescribed by law, all the recognizances entered into by any person or persons to appear at such called court, shall stand obligatory to the next court of such county or corporation, and every such person or persons shall be obliged to appear accordingly, and that such examination or trial shall be at the next court to be held for such county or corporation, which court shall be composed of the same number of justices as are now required by law; (a) any thing in this or any other act to the contrary notwithstanding.

Sect. 3. This act shall commence and be in force so soon as the act herein before mentioned and recited shall, by virtue of the governor's proclamation, commence and be in operation.

### CHAP. III.

(See 1 Rev. Code, ch. 279, p. 410.)

*An act for paying the expences of removing criminals from the district jails to the penitentiary house, and for other purposes, passed January twenty-first, 1801.*

Sect. 1. Be it enacted by the General Assembly, That whensoever any person or persons shall be sentenced by a district court to undergo confinement in the jail and penitentiary house, it shall be lawful for a judge of such court, or any two justices of the peace of the county wherein the said court was held, by warrant under his or their hands and seals, to empower the sheriff charged with the conveyance of such prisoner, or prisoners, in all counties and places through which he shall pass with him or them, to impress, upon the best terms that the nature of the case will admit of, such and so many men,\* horses, and boats, as shall be necessary for the safe conveyance of the said prisoner or prisoners to the said jail and penitentiary house; which warrant the sheriff is hereby required to execute, and to his commands, in virtue thereof, all persons are to pay due obedience. (b)

Sect. 2. The sheriff and guard attending any prisoner or prisoners,

\* This section was adopted as a substitute for section sixteen of ch. 1, which, very inconsistently with the general principles of the law, declared that every felony, misdemeanor, or offence, not provided for by that act, should be punished as heretofore.

(z) See 1 Rev. Code, ch. 74, p. 102. 2 Rev. Code, ch. 34, p. 36.

(a) By act of 1803 (2 Rev. Code, ch. 34, sect. 1, p. 36, post ch. 8) the sheriff is to summon at least eight magistrates, five to constitute a court.

(b) But no sheriff shall summon more than two guards, to assist him in conveying any one convict to the penitentiary. 2 Rev. Code, ch. 121, sect. 3, p. 154.

(c) See an act of 1800 (2 Rev. Code, ch. 95, p. 121) for regulating imprisonments; and title *Imprisonments*, of this work.



by virtue of a warrant, as aforesaid, shall be privileged from arrests in all cases, except treason, felony, and breaches of the peace, during the time that they are employed in conveying such prisoner or prisoners, to the said jail and penitentiary house, and in returning therefrom, allowing one day for every twenty miles from their places of abode; and shall be authorised to have and receive, each, one dollar and four cents for every day they shall be so employed; and four cents per mile for travelling to the said jail and penitentiary, and the same for returning, besides ferriages; and such sheriff shall also be allowed all necessary expences incurred by him, as well for horses and boats impressed for the purposes aforesaid, as for the support of the prisoner or prisoners, during the time of their removal.

Sect. 3. In case any horse or horses should be impressed by a sheriff, either for himself or any of the guard, all charges on account thereof, shall be deducted out of the pay of the person using such horse or horses; and the auditor of public accounts is required to issue his warrants on the treasurer for any money allowed by this act.

Sect. 4. Provided, however, that before the sheriff attending any prisoner shall be entitled to a warrant or warrants, under this act, he shall produce to the said auditor a receipt from the keeper of the said jail and penitentiary, for the prisoner or prisoners which he was required to convey, and make oath that the number of men, boats, and horses impressed by him, in removing such prisoner or prisoners, and other expences thereby incurred, were, in his opinion, absolutely necessary. And any person impressed as a guard, by virtue of this act, before he shall receive a warrant for the sum to which he is entitled, shall make oath as to the number of days he was employed, the distance he travelled, and the ferriages paid, or to be paid by him.

Sect. 5. The keeper of the said jail and penitentiary, when he shall see cause, may request the aid of the attending physician, to any prisoner confined therein, the charges whereof, as well as for medicines for such prisoner, and the expences of supporting him or her, during his or her confinement, shall be paid out of the treasury, by order of the executive; which expences, as well as all others incurred for beds, bunks, blankets, sheets, coal for the manufactories, repairs of tools, and salary of the instructor, shall be charged to the convicts, in such proportions as to the inspectors shall seem just. (bb) And when any prisoner shall hereafter be sentenced by a district court to undergo confinement in the jail and penitentiary house, such prisoner shall be conveyed thereto by such sheriff, as the said court shall think proper to direct; and in case of death or inability to act, by such other sheriff as shall be appointed by any two justices of the peace, by warrant under their hands and seals; all expences attending the apprehension, confinement, examination, and trial of such prisoner, as also of removing him or her to the penitentiary house, shall be charged to such prisoner; and that the whole of such expences may be fully ascertained, the clerks of the county and district courts shall, within thirty days after the conviction of such prisoner, make and certify, as accurately as they can, to the clerk of the said jail and penitentiary, a statement of the ex-

(bb) See *act of 1803 (2 Rev. Code, ch. 41, sect. 3, p. 70, part ch. 9)* by which so much of any act as directs that an account shall be kept between the public and each convict in the penitentiary, is repealed.

as heretofore, shall ascertain in their verdict, whether it be murder in the first or second degree.

Sect. 2. Whosoever shall voluntarily, maliciously, and of purpose, bite off a nose, ear or lip, or bite off or disable any limb or member of another, with intention in so doing to kill, maim or disfigure such person, every such offender, his or her aiders, abettors and counsellors, shall be sentenced to undergo a confinement in the jail and penitentiary house, for a time not less than two, nor more than ten years; and shall also pay a fine not exceeding one thousand dollars, three fourths whereof shall be for the use of the party grieved.\*

Sect. 3. Whosoever shall wilfully, maliciously, and of purpose, stab or shoot another, with intention in so doing to maim, disfigure, disable or kill such other person, every such offender, his or her aiders, abettors, and counsellors, shall be sentenced to undergo a confinement in the jail or penitentiary house, for any time not less than two nor more than ten years; and shall, moreover, pay a fine not exceeding one thousand dollars, three fourths whereof shall be for the use of the party grieved.\*

Sect. 4. Any party grieved under this act, or under the act passed the fifteenth of December, 1796, entitled, "An act to amend the penal laws of this commonwealth," shall be considered as a competent witness to prove any offence committed against either of the said acts, or any part thereof.

Sect. 5. Any person who shall be guilty of the crime of high treason, his or her aiders, abettors and counsellors, shall, on conviction thereof, be adjudged a felon, and suffer death, by hanging by the neck.

Sect. 6. This act shall not extend to any case of a slave accused or convicted of any of the offences herein mentioned.

Sect. 7. All acts and parts of acts coming within the purview of this act shall be, and the same are hereby repealed. [To commence the first of April, 1803.]

## CHAP. VII.

(See 2 Rev. Code, ch. 21, p 24.)

*An act to amend the several laws concerning the penitentiary, passed January twenty-ninth, 1805.*

Sect. 1. Be it enacted by the general assembly of Virginia, that when any convict shall hereafter be condemned to confinement in the penitentiary, for a term longer than one year, the estate of such convict, if any he hath, both real and personal, shall, by the court of the county in which the property lies, be committed to the care and management of some person to be fixed on by the said court, who shall be a trustee for the convict, until his discharge from confinement. The trustee so to be appointed shall give bond and security, to be approved by the court, for taking care of the estate to him committed, and for its re-delivery to the convict on his application, after being discharged from confinement. He shall annually render to the court, by whom

\* See title *Maiming*, of this work.

He shall be appointed, a true account of all necessary disbursements and expenditures by him made out of the said estate; and shall stand, in every respect, in the same situation as an administrator. He shall be liable to the action or actions of each and all of the creditors of the convict, who may think proper to sue for debts justly due them. He shall be compelled to pay the same, as far as the said estate will go; enjoying the privileges of an administrator as to the preference of his own debt, if any be due him; and shall possess the power of receiving, and recovering by action, when necessary, any debt which may be due the said convict. The said trustee shall allow a sufficient maintenance out of the estate of the convict to him committed, for the wife and family of such convict, if any he hath; and in every case the wife shall be entitled to the same proportion of the estate of the convict, as if he had died intestate. The said trustee shall annually retain in his own hands such compensation out of the estate of the convict, as the court who appointed him shall deem reasonable and competent to his services.

Sect. 2. The wooden inclosure now at the penitentiary shall be enlarged, so as to accommodate the prisoners in confinement; for which purpose the sum of five hundred dollars shall be appropriated out of any money in the treasury.

Sect. 3. All offences, the punishment for which does not by law at present exceed a confinement in the penitentiary for a term of one year, shall be tried in the court of that county wherein such offence was committed; and in order to carry this power more fully into effect, be it further enacted, that the several courts sitting for the examination of persons accused of crimes shall, if they are of opinion that the party ought to be further prosecuted, and that the offence with which he or she stands charged is cognizable before the county or corporation courts, by this act, take the recognizance of such person; with sufficient security for his or her appearance at the next quarterly term held for such county or corporation, and in case of refusal or inability to give such security, he, she, or they, shall be committed to prison until discharged by due course of law.

Sect. 4. The mode of trial shall be by indictment found by the grand jury of such county or corporation, according to the rules adopted in the district courts. The sheriff shall immediately thereupon summon twelve good and lawful men, not members of the grand jury, and in every respect qualified as venire men are directed, by law in the said district courts, who shall constitute a jury for the trial of such person. The right of challenge shall be exercised as at present directed by law, in the case of felonies.

Sect. 5. Persons convicted under this act shall be punished by stripes on his or her bare back, not less than ten, nor more than forty, for any one offence, or by confinement in the penitentiary house, for a term to be fixed by the verdict of the jury by whom such person shall have been tried, not exceeding twelve months, nor less than six months, at the election of such convict; which election shall be made before the jury retire from the bar. (f) And if any person shall be

(f) See act of 1803 (3 Rev. Code, ch. 41, p. 70, sect. 4, *post*, ch. 9.) by which persons convicted of petty larceny (who are to be tried as directed by this act) shall be punished by stripes, not less than ten nor more than forty, or by confinement in the penitentiary, for a term not less than eighteen months, at the discretion of the jury.

convicted of a like offence a second time, he shall be sentenced to undergo a confinement in the penitentiary house, for a term not less than one, nor more than two years.

Sect. 6. Sheriffs and other persons employed in transporting criminals, convicted under this act, shall be paid in like manner as those employed in transporting those convicted in the district courts, and witnesses shall receive like compensation with those attending the examining courts. [To commence the first of June, 1863.]

## CHAP. VIII.

(See 2 Rev Code, ch. 34, p. 36.)

*An act to amend an act, entitled, "An act directing the method of proceeding against free persons charged with certain crimes, directing the mode of proceeding on indictments, informations, and prosecutions, on penal statutes, and for preventing vexatious and malicious prosecutions, and moderating amercements,"\* and for other purposes.*

Sect. 1. Be it enacted by the general assembly, that from and after the commencement of this act, when any person, not being a slave, shall be charged before a justice of the peace, with any treason, murder, felony, or other crime or offence whatsoever, against this commonwealth, if, in the opinion of such justice, such offence ought to be inquired into, in the courts of this commonwealth, such justice shall take the recognizance of all material witnesses, to appear before the court of his county or corporation, to give evidence against the offender, and immediately, by his warrant, commit the person so charged to the county or corporation jail; and moreover, shall issue his warrant to the sheriff of the county, or sergeant of the corporation, requiring him to summon at least eight, if so many there be, of the justices of the county or corporation to meet at their court-house on a certain day, not less than five nor more than ten days after the date thereof, to hold a court for the examination of the fact; which court, consisting of five members at least, shall consider whether, as the case may appear to them, the prisoner may be discharged from farther prosecution, or may be tried in the county or corporation, or in the district court; and shall thereupon proceed in the same manner as prescribed by the act, entitled, "An act, directing the method of proceeding against free persons charged with certain crimes, declaring the mode of proceeding on indictments, informations and prosecutions, on penal statutes, and for preventing vexatious and malicious prosecutions, and moderating amercements." If any justice, before whom any person is charged with any such crime or offence, shall commit such person to jail, and neglect or refuse to issue his warrant immediately, for summoning the justices of his county or corporation to hold a court for the examination of the fact; or if any sheriff or sergeant shall neglect or refuse to obey such warrant, or neglect or refuse to return the warrant to the court so summoned, endorsing thereon the manner in which he has executed the same, every person, so neglecting or refus-

\* See 1 Rev. Code, ch. 74, p. 102.

ing hereafter, shall, in either case, forfeit and pay the sum of one hundred dollars, to the use of the commonwealth, to be recovered by action of debt or information, in any court of record; and moreover, shall be subject to the action of the party aggrieved, in which, if he or she recover, he or she, beside damages, shall recover double costs.

Sect. 2. When any person shall be sent by a county or corporation court, to the district court, to be tried for treason or felony, the clerk of the court of the county or corporation shall transmit and certify immediately, to the clerk of the district court, a copy or copies of the recognizance or recognizances of each and all the witnesses, recognized to appear at the district court, to give evidence against the prisoner; and if the witness or witnesses, so bound to appear, shall fail to appear, pursuant to his, her, or their recognizance, the district court shall immediately cause his, her, or their default to be recorded; and it shall be lawful for the district court to issue a writ or writs of scire facias, upon which the like proceedings shall be had, as if the recognizance of the witness or witnesses had been taken in the district court: Provided, that the witness or witnesses shall first be summoned to shew cause, if any he, she, or they can, why such scire facias should not be issued. In like manner, the clerk of the court of any county or corporation shall certify and transmit to the clerk of the district court, a copy or copies of the recognizance of any prisoner let to bail, who is to be tried in the district court, and also a copy or copies of the recognizance or recognizances of his or her bail; and if any prisoner let to bail shall fail to appear in the district court, pursuant to his or her recognizance, the district court shall immediately cause his or her default to be recorded, and shall issue a writ or writs of scire facia against the prisoner, and his or her bail, upon which the like proceedings shall be had, as if the prisoner had been let to bail by the district court. The copy or copies of all recognizances so certified and transmitted to the clerks of the district courts, by virtue of this act, shall be admitted and received as evidence in the said courts, in like manner as the original or originals might have been, had they been entered in the district courts. Any clerk failing to perform the duties required of him by this act shall forfeit and pay, for each failure, to the use of the commonwealth, the sum of one hundred dollars, to be recovered by action of debt or information, in any court of record. Any clerk failing to perform the duties required of him by the twentieth section of the before recited act shall forfeit and pay, to the use of the commonwealth, the sum of fifty dollars, to be recovered in any court of record, by action of debt or information.

Sect. 3. If any person charged with any crime or offence against the commonwealth shall be acquitted or discharged from further prosecution, by the court of the county or corporation in which the offence is or may by law be examinable, he or she shall not thereafter be examined, questioned, or tried, for the same crime or offence, but may plead such acquittal or discharge in bar of any other or further examination or trial for the same crime or offence, any law, custom, usage, or opinion, to the contrary, in any wise notwithstanding.

Sect. 4. A court held by virtue of this or the before recited act, for the examination of any person charged with any crime or offence

against the commonwealth, may, for good cause shewn, adjourn to any subsequent day : Provided, that they shall not adjourn for a longer period than three days, except on the application of the prisoner, and then for not more than ten days from the day of adjournment, at which time such proceedings shall be had, as if the court had proceeded to the examination of the fact at their first sitting.

Sect. 5. Before any person charged with treason or felony shall be tried before a district court, he or she shall be examined, in the manner prescribed by law, by the court of the county or corporation wherein the offence was committed.

Sect. 6. After the verdict of twelve men, no judgment on any indictment or information, for felony or any other offence whatsoever, shall be stayed or reversed, for any supposed defect or imperfection in any such indictment or information, so as the felony or offence therein charged to have been committed or done be plainly, and in substance, set forth with convenient certainty, so as to enable the court to give judgment thereupon, according to the very right of the cause, any former law, custom, or usage, to the contrary notwithstanding.

Sect. 7. Nothing in this act contained shall be so construed as to apply to any indictment or information already filed and now depending, or in any manner to repeal the act directing the mode of suing out and prosecuting writs of habeas corpus, or the act directing what prisoners shall be let to bail.

Sect. 8. All acts and parts of acts within the purview of this act are hereby repealed. [To commence the first of April, 1803.]

## CHAP. IX.

(Sec 2 Rev. Code, ch. 41, p. 70.)

*An act to amend the act, entitled, "An act to amend the penal laws of this commonwealth," and for other purposes, passed February first, 1804.*

Sect. 1. Be it enacted by the general assembly, that the term of confinement in the penitentiary of every free person convicted of robbery, burglary, or horse stealing, or as accessory thereto, shall be not less than five years, nor more than ten years; and of every such person convicted of arson, (g) or as accessory thereto, shall be not less than ten years, nor more than twenty-one years.

Sect. 2. So much of the act, entitled, "An act to amend the penal laws of this commonwealth," (h) as directs an account to be kept between the public and each convict in the penitentiary, shall be and the same is hereby repealed; but it shall be hereafter in the discretion of the inspectors, on the discharge of any prisoner, to make him an allowance not exceeding thirty dollars, if, in their judgment, such prisoner shall have been industrious, and conducted himself in an orderly manner.

(g) Arson is now punishable with death. See act of 1804, ch. 5, sect. 8, p. 7. *post* ch. 10.

(h) See ant. ch. 1, sect. 38. By act of 1804, entitled, "An act allowing a claim to Edward Burgess, and for other purposes" (ch. 98, sect. 1, 3, p. 57.) the provisions of this act are declared not to extend to such prisoners as had created a debt against the commonwealth before the passing thereof.

Sect. 3. The trial of prisoners escaping from the penitentiary shall in future be had for such escape, before the district court holden in the city of Richmond;\* and prisoners, so escaping, shall remain in the penitentiary, and be treated as other convicts, after their apprehension, until such trial shall take place; upon which trials, the copies of the records transmitted to the keeper of the penitentiary, relative to the former trials of such prisoners, shall be produced and filed of record in the said district court.

Sect. 4. All free persons, accused of petty larceny, shall be tried in the court of that county wherein such offence was committed, in the manner prescribed by the act, entitled, "An act to amend the several laws concerning the penitentiary;"† and upon conviction of an offender, he or she shall be punished by stripes, on his or her bare back, not less than ten, nor more than forty, for any one offence, or by confinement in the penitentiary house, for a term not less than eighteen months, at the discretion of the jury before whom such person shall be tried.

Sect. 5. The inspectors of the penitentiary, the governor and council, and the attorney general, shall constitute a board, with full power to make such regulations for the internal government of the penitentiary, as may to them from time to time appear expedient, to which regulations the keeper and all the officers shall strictly conform. (i) [To commence the first of April, 1804.]

## CHAP. X.

(See 1 Rev. Code, ch. 55, p. 79.)

*An act further to amend the penal laws of this commonwealth, passed January twenty-ninth, 1805.*

Sect. 1. Be it enacted by the general assembly, that the thirty-fourth section of an act, passed on the thirteenth day of November, in the year one thousand seven hundred and ninety-two, entitled, "An act directing the method of proceeding against free persons charged with certain crimes, declaring the mode of proceeding on indictments, informations and prosecutions, on penal statutes, and for preventing vexatious and malicious prosecutions, and moderating amercements," (k) shall be, and the same hereby is repealed.

Sect. 2. All actions, suits, bills, indictments, or informations, which shall be had, brought, sued, or exhibited, upon any penal law, where the punishment to be inflicted upon the offender, on conviction, shall neither be death nor imprisonment in the jail and penitentiary house, shall be had, brought, sued, exhibited, or moved, within one year next after the offence committed, and not after; except where a longer or shorter time for the commencement of such suit or prosecution is, or shall be fixed by law.

\* This power now devolves on the circuit court holden at Richmond. See 2 Rev. Code, ch. 121, sect. 9, p. 186.

† Ant. ch. 7, sect. 3, 4.

(i) This clause repealed. See post. ch. 12, sect. 1.

(k) 1 Rev. Code, ch. 74, p. 106.

Sect. 3. Every indictment or information, for perjury, subornation of perjury, or such forgeries or publications thereof, as may not be punishable by death, or imprisonment in the jail or penitentiary house, shall be exhibited or moved within three years next after the time of committing the offence, and not after.

Sect. 4. If any person shall steal any hog, shoat, or pig, such person shall be adjudged to be guilty of petty larceny, and shall have the same trial and punishment, as in other cases of petty larceny. (1)

Sect. 5. If any person shall falsely make, forge or counterfeit, or cause or procure to be falsely made, forged or counterfeited, or willingly act or assist in the false making, forging or counterfeiting, any bill or note of the bank of Virginia, with intention to defraud either the corporation of the president, directors and company of the bank of Virginia, or any person whatsoever; or shall pass or tender, or offer to pass or exchange, or shall cause or procure to be passed or tendered, or offered to be passed or exchanged, any such bill or note of the bank of Virginia, knowing the same to be false, forged or counterfeited, then every such person, being thereof lawfully convicted, shall be punished with confinement in the jail and penitentiary house, at hard labour, for not less than ten, nor more than twenty years. (m)

Sect. 6. In all prosecutions for offences under this act, the president, cashier and other officers of the said bank of Virginia, or either of its offices of discount and deposit, and all stockholders, shall be deemed, and admitted as competent witnesses.

Sect. 7. All and every person and persons, who shall at any time, either in the night or the day, maliciously, unlawfully and willingly, burn or set fire to any house or houses whatsoever, in a town, or shall aid, abet, assist, council, hire or command any person or persons to commit any of the said offences, being thereof lawfully convicted, and either of the said offences shall actually have been committed, shall be deemed guilty of felony, and shall suffer death as a felon.

Sect. 8. If any person shall commit arson, being thereof lawfully convicted, he shall be deemed guilty of felony, and shall suffer death.

Sect. 9. All and every person and persons, who shall at any time, either in the night or the day, maliciously, unlawfully, and willingly, burn or set fire to any barn, stable, corn-house, tobacco-house, stack of wheat, barley, oats, corn, or other grain, or any stack of fodder, straw, or hay; or shall aid, abet, assist, counsel, hire, or command, any person or persons to commit any of the said offences, being thereof lawfully convicted, and either of the said offences shall actually have been committed, shall be deemed guilty of a misdemeanor, and shall be sentenced to undergo a confinement in the jail or penitentiary house, for any time not less than two, or more than five years; and shall, moreover, pay the full value of the property burnt or destroyed, to the owner or owners thereof.

Sect. 10. Whosoever shall voluntarily, and of purpose, slit the ear or lip of another, with intent to mark or disfigure such person, every

(1) See, as to the mode of trial for petty larceny, act of 1803 (2 Rev. Code, ch. 41, sect. 4, p. 70. ant. ch. 9.) act of 1808, 2 Rev. Code, ch. 21, sect. 3, 4, p. 24. ant. ch. 7.

(m) See act of 1806 (2 Rev. Code, ch. 91, p. 118. *post*. ch. 11.) the punishment for obtaining notes or money from the bank, by means of forged checks or orders, or for counterfeiting the seal of the bank, or for committing thefts or robberies of bank notes.



such offender, his or her aiders, abettors and counsellors, shall, on conviction, be sentenced to undergo an imprisonment at hard labour, and solitary confinement, in the jail and penitentiary house, for not less than two, nor more than ten years.

Sect. 11. And be it further enacted, that if any slave shall hereafter attempt to ravish a white woman, and shall be thereof lawfully convicted, he shall be considered guilty of a felony, and shall be punished as heretofore.

Sect. 12. Those shall be let to bail who are apprehended for any crime not punishable with death, or confinement in the jail and penitentiary; and if the crime be so punishable, but only a light suspicion of guilt fall on the party, he shall in like manner be bailable: but if the crime be punishable with death, or confinement in the jail and penitentiary, and there be good cause to believe the party guilty thereof, he shall not be admitted to bail.

#### CHAP. XI.

(See 2 Rev. Code, ch. 91, p. 118.)

*An act to punish certain thefts and forgeries, passed December thirty-first, 1806.*

Sect. 1. Be it enacted by the general assembly, that if any person shall fraudulently obtain, or aid or assist in obtaining, from the bank of Virginia, or any of its offices of discount and deposit, any bank or post note, or money, by means of any forged or counterfeited check or order whatsoever, knowing the same to be forged or counterfeited, then every such person, being duly convicted thereof, shall be sentenced to suffer imprisonment in the jail and penitentiary house, for a period of time not less than two, nor more than ten years.

Sect. 2. And be it further enacted, that if any person shall forge or counterfeit, or aid in forging or counterfeiting, or keep or conceal, or aid in keeping or concealing, any instrument for the purpose of forging or counterfeiting the seal of the bank of Virginia, then every such person, being duly convicted thereof, shall be sentenced to suffer imprisonment in the jail and penitentiary house, for a period of time not less than five years, nor more than fifteen years.

Sect. 3. And be it further enacted, that if any person shall steal or take by robbery from another, any bank or post note, then every such person, being duly thereof convicted, shall be sentenced to suffer imprisonment in the jail and penitentiary house, for a period of time not less than three years, nor more than ten years. [To commence from the passing.]

#### CHAP. XII.

(See 2 Rev. Code, ch. 111, p. 140.)

*An act concerning the internal regulations of the penitentiary house, passed January twentieth, 1807.*

Sect. 1. Be it enacted by the general assembly, that so much of any act or acts, as requires that a board of inspectors shall be appointed for

the government of the jail and penitentiary house, and ascertain their powers and duties; and so much of any act or acts as empowers the said inspectors, with the executive and the attorney general, to form a board, with power to prescribe rules for the internal government of the said jail, shall be and the same are hereby repealed. (n)

Sect. 2. It shall and may be lawful for the governor, by and with the advice and consent of council, from time to time, to make and ordain all such rules and regulations as to them shall seem expedient, for the purchase of materials for the manufactories carried on within the jail and penitentiary house, and the tools and implements necessary therein; for contracting for the clothing and diet of convicts; for the sale of articles by them manufactured; for providing for and enforcing all such punishments by solitary confinement, low and coarse diet, or by stripes, not exceeding thirty-nine, as may be necessary for punishing offences, disobedience, profane cursing and swearing, indecent behaviour, idleness, and other breaches of duty and good order, committed within the jail and penitentiary house by the convicts therein confined; which rules and regulations, so ordained and established, it shall be the duty of the keeper, his clerks, assistants, and turnkeys, to obey and execute.

Sect. 3. In addition to the powers hereby vested in the governor and council, it shall and may be lawful for them, from time to time, to execute any or all of the powers and duties at any time heretofore vested in or enjoined upon the mayor of the city of Richmond, the court of the said city, the inspectors, or the inspectors with the governor and council and the attorney general, whenever the exercise of all or any of the powers aforesaid shall to them appear expedient and necessary for the good government of the jail and penitentiary house.

Sect. 4. So much of any act or acts of assembly as allows to the keeper of the said jail any commission or commissions upon the purchase or sale of any article or manufacture shall be, and the same is hereby repealed. (o) But the governor, with the advice of council, may nevertheless contract with the said keeper, or with any other person or persons, for the diet and clothing of the prisoners; for the purchase of materials, tools, and implements, and for the sale of wares and merchandise manufactured within the said jail, on such terms as to them shall seem most adviseable for the public interest, and from time to time may make such reasonable allowances or commissions on the objects aforesaid, as they shall deem proper.

Sect. 5. The keeper shall compel every prisoner to perform his daily labour, unless such prisoner shall have been placed on the list of invalids by the physician, whose duty it shall be to visit the penitentiary once in every day (Sundays excepted) from the first of July to the first of November, once in two days the residue of the year, for the purpose of examining the convicts as to their health and ability to work.

Sect. 6. The salary of the physician, appointed by the executive to visit the jail or penitentiary, shall be five hundred dollars, to commence from the first day of January, one thousand eight hundred and seven. [To commence from the passing.]

(n) See ant. ch. 1, and ch. 9, s. 5.

(o) Ant. ch. 1, sect. 37.

## CHAP. XIII.

(See 2 Rev. Code, ch. 132, p. 166.)

*An act to amend the penal laws of this commonwealth, passed February tenth, 1808.*

Sect. 1. Be it enacted by the general assembly, that if any slave or slaves, at any time hereafter, shall wilfully and maliciously burn or set fire to any barn, stable, corn-house, or other house, or shall advise, counsel, aid, abet, or assist any slave or slaves, free negro or mulatto, to commit either of the said offences, being thereof lawfully convicted, if the amount of the burning be of the value of ten dollars, he, she, or they, shall be deemed guilty of felony, and shall suffer death, as is provided in other cases of felony.

Sect. 2. If any slave or slaves shall wilfully and maliciously burn or set fire to any stack or cock of wheat, barley, oats, corn, or grain, or to any stack or cock of hay, straw or fodder, or shall advise, counsel, aid, abet, or assist any slave or slaves, free negro or mulatto, to commit either of the offences in this section mentioned, being thereof lawfully convicted, he, she, or they shall be deemed guilty of felony, and shall be burnt in the hand, and receive on their back any number of lashes not exceeding thirty-nine, as the court in their discretion may think fit to inflict. [To commence from the passing.]

## CHAP. XIV.

(See sessions acts of 1808, ch. 4, p. 5.)

*An act allowing persons arraigned of misdemeanors, in certain cases, the right of challenge, passed January ninth, 1809.*

Be it enacted by the general assembly, that in all cases where any person or persons shall hereafter be put upon his, her or their trial for any misdemeanor, the punishment whereof is or shall be confinement in the jail and penitentiary house of this commonwealth, such person or persons shall be allowed the same right of challenge as is allowed to persons arraigned for felony. [To commence from the passing.]

## CHAP. XV.

(See sessions acts of 1808, ch. 23, p. 31.)

*An act to amend the penal laws of this commonwealth, passed February seventh, 1809.*

Sect. 1. Be it enacted by the general assembly, that if any person shall voluntarily, wilfully, and of purpose, destroy or conceal the last will and testament of any decedent, or any codicil to such last will and testament, or shall wilfully aid or assist in the destroying or con-

cealing any such last will and testament, or any codicil thereto, with intent to prevent the probate thereof, or to defraud any devisee or legatee under such last will and testament, or codicil thereto, he or she so offending, being legally convicted thereof, shall be deemed guilty of felony, and shall be sentenced to undergo a confinement in the jail and penitentiary house, for a period not less than one nor more than ten years.

Sect. 2. When a presentment shall be made by a grand jury of this commonwealth, in any of the superior courts thereof, having criminal jurisdiction, of a felony committed by any person; and the person so presented would be entitled to a trial before an examining court of his or her county; it shall be the duty of the judge who presides when such presentment is made, to issue his warrant, directed to any sheriff or constable, for apprehending the person so charged, and commit him, her or them, to the jail of the county where the presentment shall charge the said offence to have been committed; and upon the person so charged being apprehended and committed to jail, the jailor shall immediately notify some justice of the peace, in and for his county, thereof; which justice shall issue his warrant to the sheriff of his county, commanding him to summon the justices thereof, for the purpose of holding an examining court upon the person committed, under the same rules and regulations examining courts are now directed to be held upon persons charged with felony. And it shall be the duty of the said sheriff to summon the witnesses who gave evidence before the grand jury when the presentment was made (as well as any others) to attend the said examining court. A list of the names of the witnesses who gave evidence before the grand jury shall be endorsed upon the warrant by the judge, at the time of issuing the same. [To commence from the passing]

☞ The act of the 20th of January, 1807 (*ant. ch. 12*) having abolished the board of inspectors, and transferred to the executive the powers formerly exercised by them, as well as the power of making and ordaining rules and regulations for the internal government of the penitentiary, the executive, on the 23d of January, 1807, adopted provisionally the then existing rules and regulations; and afterwards adopted the following:

## ADVICES OF COUNCIL

### CONCERNING THE

### PUBLIC JAIL AND PENITENTIARY HOUSE,

IN COUNCIL, *January 31st, 1807.*

1. IT is advised that an agent for the penitentiary be appointed, to reside in the city of Richmond, whose duty it shall be to purchase all the raw materials which may be necessary for the internal operations of that institution, and every other article which may be required for

the use of the prisoners, except what relates to their diet; and to sell at some convenient place in the said city, all the articles manufactured for sale at the penitentiary, for which services he shall be allowed a commission of five per centum on the gross amount of sales, deducting from such commission, however, the expense of transporting the manufactured articles from the penitentiary to the city of Richmond.\*

2. It shall be the duty of the keeper of the penitentiary, on every Monday throughout the year, to deliver to the said agent, every article manufactured by the convicts during the preceding week, except such as may be directed by the executive to be manufactured for the public service, and excepting also, such tools and implements, and other articles, as may be made by the convicts for the use of the institution. An invoice containing an accurate account of the several articles sent from the penitentiary, either for sale or the use of the commonwealth, as the case may be, shall be made out by the keeper and forwarded with the said articles; and the receipt of the agent, or other person who shall be authorised by the executive to cause any articles to be manufactured at the penitentiary, for the public service, annexed to a duplicate of such invoice, shall be a sufficient voucher to the keeper. The like proceedings shall be had with respect to all articles purchased by the agent for the use of the penitentiary.

3. It shall be the duty of the agent as well as the keeper of the penitentiary, regularly, on the first days of March, June, September, and December, in every year, to render to the executive an accurate statement of their accounts, together with the vouchers on which each item is founded; a copy of which account they are also to furnish to each other. The said agent shall give bond in the penalty of fifteen thousand dollars, with such security as shall be approved by the executive, for the faithful performance of the duties of his office; shall at all times be removable at the pleasure of the executive; and shall quarterly pay into the treasury whatever balance shall remain in his hands.

4. The clerk of the penitentiary shall keep a regular account with the agent; and also an account between the commonwealth and the penitentiary. At the several periods above mentioned, he is to render to the executive a detailed account of the operations of the penitentiary, during the preceding quarter, in which every item of debit and credit is to be entered, and at the end of the year he is to furnish a general result of those operations, shewing whether the commonwealth is gainer or loser by the institution.

5. At the commencement of each quarter, or oftener, if necessary, the keeper of the penitentiary shall lay before the executive a statement of the several articles, as well as the monies which he may deem necessary for the use of the institution during the quarter; and no monies shall be drawn from the treasury, or articles purchased by the agent, but by order of the executive.

6. The keeper of the penitentiary shall be allowed a commission of fifteen per centum on the clear profits of the institution, after deducting all the expences incident thereto. And each turnkey and assist-

\* Agents have since been appointed residing in Petersburg, Lynchburg, and Fredericksburg, for the purpose of selling articles manufactured at the penitentiary. All the purchases of raw materials are made by the agent at Richmond.

ant keeper shall be allowed a commission of five per cent. on the clear profits of the institution, after a like deduction.

IN COUNCIL, *January 31st, 1807.*

1. IT is advised, that twelve persons be appointed by the executive to visit the penitentiary, who shall continue in office until the first day of January next, and a similar appointment shall be annually made. The persons so appointed, seven of whom shall be a quorum, shall meet once in three months, in the apartment heretofore provided for the use of the inspectors in the said jail, and shall then and there select two of their body to act as visitors for each month, who shall examine into the management of the said jail, and the conduct of the keeper and his deputies, and shall make a report thereof to the visitors when quarterly convened, or, if they deem it necessary, immediately to the executive. The said visitors at their quarterly meetings are requested to make such communications to the executive, and to suggest such alterations and amendments in the system, as they may deem proper. The said visitors are particularly requested to report any interruption or indignity they may receive either from the keeper, the turnkeys, or any other person, in the discharge of their duty.

2. Any one of the said visitors shall be empowered to grant a permit to any person whom he may think it proper and safe to allow to visit the penitentiary.

### ADDITIONAL RULES.

IN COUNCIL, *June 29th, 1809.*

1. WHENEVER the keeper shall furnish any manufactured articles to an agent, he shall immediately send a certified copy of the invoice to the auditor of public accounts, to enable him to debit such agent with the amount.

2. The several agents, in the settlement of their accounts, shall render accounts of stock on hand, as well as of sales of manufactured articles; and at the end of each year an actual inventory shall be taken.

3. The auditor is instructed to keep regular accounts between the commonwealth and each agent.

IN COUNCIL, *September 19th, 1809.*

IT is advised that the auditor be directed to open and keep a regular account between the commonwealth and the penitentiary, charging that institution with warrants of every description appertaining thereto, and giving it credit for all work done for the public, and for sales made by the several agents.

The several agents for selling articles manufactured at the penitentiary are required to settle their accounts quarterly with the auditor, and pay into the treasury whatever balances may be due from them to the commonwealth; and the auditor is instructed to report to the executive, immediately after each quarter day, the name of any agent who shall fail to settle and pay as aforesaid.

## RULES AND REGULATIONS

3. *For the internal government of the public jail and penitentiary; adopted by the executive on the twenty-ninth of April, 1807.*

1. It shall be the duty of the keeper, upon the receipt of any convict, to take his or her height, and cause the same to be entered in a book; in which he shall also note when such convict was received; his or her name, age, complexion; coloured hair and eyes; the district in which he or she was convicted; the nature of the crime; period of confinement; what portion of that period in solitude, and the place of his or her nativity.

2. Every prisoner shall be carefully searched, and deprived of any instrument by which he or she may effect his or her escape, before he or she is received into the jail.

3. The keeper is authorised and required, as to him shall seem most conducive to the public interest, and the reformation of the prisoners, to punish any convict who shall be guilty of disobedience, profane cursing and swearing, indecent behaviour, idleness, and other breaches of duty and good order, by whipping, not exceeding thirty-nine lashes for any one offence, or by confinement in the solitary cells, in darkness, and without a bed, on a scanty allowance of bread and water only. Provided, that for the first offence, the period of such confinement shall not exceed ten days, nor for any subsequent offence, fifteen days, without the consent of the governor by and with the advice of the council.

4. Solitary confinement may in all cases be dispensed with, where, in the opinion of the keeper, the state of any prisoner's health, or the interest of the commonwealth, may render it expedient to do so.

5. The particular employment of each prisoner shall be such as the keeper may consider best adapted to his or her age, sex, and state of health; having due regard to that employment which is most profitable. The keeper shall deliver out the materials and receive the work by weight or measure, as far as practicable, in order to prevent embezzlement or waste. He shall cause each assistant to keep a book, in which shall be entered, opposite the name of every prisoner in his ward, the quantity of raw materials delivered out to him or her in any week, and regularly enter, under each day of the week, the work which has been completed on that day. At the end of the week the labour of each convict shall be ascertained; and any convict who shall be found remiss, or negligent in performing the work required, to the best of his or her power and abilities, or who shall wilfully waste, damage, or embezzle the said materials, or any part thereof, shall be severely punished as prescribed by the third rule.

6. The males and females shall at all times be kept separate and apart.

7. The keeper shall take care that the prisoners wash themselves every morning, and before meals, and put on clean linen at least once a week (when all the males shall have their heads and beards close shaved) and that their apartments be swept every morning, and fu-

migated during the summer and fall seasons, once a week, or oftener, with tar and vinegar.

8. The keeper shall permit no person (except the visitors of the penitentiary and others authorised by law) to go into the jail and penitentiary house, without a written license from a member of the executive, or from one of the said visitors. In all cases of permits to visit the penitentiary, the names of the parties permitted to visit ought to be inserted in the license for that purpose. And where a person wishes to visit a friend or connexion who may be a prisoner in the penitentiary, it must be so expressed in the permit, if the fact can be ascertained. If the applicant to visit be of known bad character, or have been frequent in making applications, or shall have been detected in any improper intercourse with any of the prisoners, or if the conduct of the prisoner whom he or she may wish to see has not been uniformly correct, the keeper may refuse admittance beyond the inner gate, or prevent the parties from conversing, except through the aperture of the said gate, notwithstanding a permit may have been obtained to visit the interior of the penitentiary. An indulgence to a person to visit a friend or connexion within the interior of the penitentiary can only be the result of good conduct in both parties; and when such indulgence is granted, the keeper or one of his assistants shall always be present. No letter or other communication in writing shall be suffered to go in or out of the said jail, until the same shall have been examined and approved by the keeper; nor shall any person, without his consent, carry any thing in or out, for the use of the prisoners.

9. The keeper shall cause all the rooms and cells to be numbered, and divided into so many wards as there may be assistants; allotting to each ward, as nearly as may be, an equal number of rooms and cells, and one of the said wards to each assistant; whose duty it shall be, under the direction of the keeper, to examine every evening the doors, windows, beds, and rooms of the prisoners belonging to his ward; to search and lock them up before dark, and not suffer them to carry into their apartments any instrument that may assist them in escaping; and also to extinguish carefully all the fire in the work-rooms.

10. The keeper shall not suffer more than one of the convicts at a time to approach the visitors, or other persons permitted to go into the jail, nor any convicts to listen to any thing such persons are saying, except when spoken to and desired to pay attention.

11. The keeper shall not suffer any kind of gaming in the jail and penitentiary house, either among the convicts or his assistants; nor cursing or swearing, or other profane language.

12. The keeper shall cause the yard of the jail and penitentiary house to be kept free from horses, cows, goats, hogs, and fowls, and the necessary to be kept inoffensive.

13. It shall be the duty of the keeper, on the receipt of each prisoner, to read to him or her such parts of the penal laws of this commonwealth as impose penalties for escapes, and to make all the prisoners in the penitentiary acquainted with the same. It shall also be his duty, on the discharge of each prisoner, to read to him or her such parts of the said laws as impose additional punishments for the repetition of offences.



14. It shall be the duty of the keeper carefully to inspect the moral conduct of the prisoners; to furnish them with such moral and religious books as shall be recommended by the visitors; to procure the performance of divine service, on Sundays, as often as may be; and to enjoin a strict attention to all the rules of the institution.

15. The visitors are respectfully requested to recommend to the keeper the introduction among the prisoners of such cheap books as they may deem best calculated to improve the mind and ameliorate the heart; and the acting visitors will please to report to the executive such of the convicts as may distinguish themselves for their industry and good morals, and who by an exemplary line of conduct may have evinced a total reformation.

16. It shall be the duty of the turnkey and his assistants to continue at all times in the prison all night, and to keep watch in such manner as the keeper shall direct.

17. It shall be the duty of the keeper to cause the clothes of the prisoners, when received into the penitentiary, to be washed and carefully put away, putting a ticket with their names to each, to be returned them on their discharge; or if it should be the wish of any of the prisoners that their clothing should be sold, he shall dispose of them to the best advantage, and retain the money arising from such sale, to be returned to such prisoners on their discharge.

18. The clothing annually furnished the prisoners shall consist, for each male, of one short coat and one pair of overalls, made of coarse drab and blue cloth, and one waistcoat, made of brown and green cloth, alternately forming the different parts; two pair of shoes, two pair of yarn stockings, two shirts, and two pair of trousers, made of oznaburghs; and for each female, of two short gowns and two petticoats, made of blue and green plains, alternately; two shifts and two petticoats, made of oznaburghs, two pair of shoes, two pair of yarn stockings, and two blue linen or cotton neck handkerchiefs.

19. The diet of the prisoners shall be as follows.\* For breakfast, three-fourths of a pound of meal made into bread, and one-half of a gill of molasses mixed with water. For dinner, half a pound of meal made into bread (a sufficient quantity to thicken soup being reserved) half a pound of coarse meat made into soup, and a pint of Irish potatoes. But when potatoes or coarse fresh meat cannot be had, the keeper may, in lieu thereof, receive of the contractor any other provisions in season, of equal value, though of different quantities. Provided, however, that, for extraordinary services performed by any prisoner, the keeper may increase the said allowance, and may diminish it for any neglect of duty or other offence. The said provisions shall be sound and wholesome, and served at the ringing of a bell, at the sound of which all the prisoners shall assemble, and eat together, except the sick, who shall be furnished agreeably to the directions of the attending physician.

20. The acting visitors are requested, at the expiration of their respective terms of service as such, to make a report to the executive of

\* The component parts of each day's ration for a convict have, since the seventeenth of April, 1867, been furnished by contracts with the executive, annually renewed; and the price has varied from six to nine cents a ration. Before that period, the keeper was permitted to furnish them, and was allowed by the inspectors, thirteen and a half cents for each ration.

The clothing of the prisoners is now manufactured within the building.

the manner in which the foregoing rules have been carried into effect, during the time of their visitation at the penitentiary house.

On the first of April, 1807, a new keeper of the penitentiary entered on the duties of his office, and on the twenty-ninth of the same month a new set of rules and regulations were adopted by the executive, which were digested from those of *Pennsylvania, New-York*, and the former rules and regulations proposed by the board of inspectors, together with such alterations and amendments as experience had suggested. In order to estimate the advantages which have resulted from the change of system, the following comparative statement, taken from official documents, is given.

*Comparative view of the internal operations of the penitentiary, under the former and present system, embracing a period of nearly six years.*

#### FORMER SYSTEM.

No. 1....From first December, 1803, to first December, 1804.

To expences arising from purchase of raw materials, tools, diet, and clothing of prisoners, stationary, and keeper's commissions,	18,392 28
By manufactured articles, and stock on hand,	16,578 67

Loss      \$ 1,813 61

No. 2....From first December, 1804, to first December, 1805.

To expences, &c. (as in No. 1.) and stock remaining,	21,758 2
By manufactured articles, and stock on hand,	19,066 74

Loss      \$ 2,691 28

No. 3....From first December, 1805, to first December, 1806.

To expences, &c. (as in No. 1.) and stock remaining,	24,932 13
By manufactured articles, and stock on hand,	21,871 80

Loss;      \$ 3,060 33

#### PRESENT SYSTEM.

No. 1....From first April, 1807, to first December, 1807.

To stock on hand, and expences arising from purchase of raw materials, tools, diet, and clothing of prisoners, stationary, and agent's commissions,	41,395 34½
By manufactured articles, and stock on hand,	52,266 29

Gain      \$ 10,370 94½

No. 2....From first December, 1807, to first December, 1808.

To expences, &c. (as in No. 1.) and stock remaining,	61,938 73½
By manufactured articles, and stock on hand,	79,910 34½

Gain      \$ 17,971 61

No. 3....From first December, 1808, to first December, 1809.

To expences, &c. (as in No. 1.) and stock remaining,	83,569 33 $\frac{1}{4}$
By manufactured articles, and stock on hand,	92,103 47 $\frac{1}{2}$

Gain	\$ 8,534 14
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Note, the diminution of the gain, during the last year, arose from the introduction of a spinning machine; which, being incomplete, required the expenditure of a considerable sum of money, besides the loss of labour to put it in operation; also from the convicts being necessarily engaged in manufactures, which were less profitable than those in which they were employed the year before.

Note also, if it were proper to charge the institution with the officers' salaries, the expences of that portion of the public guard, employed at the penitentiary, of the physician's salary, and of the transportation of the prisoners to the penitentiary, then these items must be added to the loss sustained in the years 1803, 4, and 5. In like manner, similar items must be deducted from the gain of 1807, 8, and 9, with the addition of an extra commission allowed to the keeper, assistants, and turnkey, on the clear profits of the institution. The above comparative view proves, that, settling the accounts upon the same principles, the operations of the present system are vastly more favourable than those of the former. The number of prisoners during the above periods was nearly the same, varying from one hundred to one hundred and twenty, as new convicts were admitted or old ones discharged.

## PERJURY AND SUBORNATION.

*I. Of perjury and subornation by the common law. II. Of perjury and subornation by statute. III. Of matters common to them both.*

### I. OF PERJURY AND SUBORNATION BY THE COMMON LAW.

PERJURY, by the common law, seemeth to be a wilful false oath, by one who, being lawfully required to depose the truth in any judicial proceeding, swears absolutely, in a matter material to the point in question, whether he be believed or not. 1 Haw. 172. 3 Inst. 164.

*Wilful*....The false oath alledged against him should be proved to be taken with some degree of deliberation; for if, upon the whole circum-

stances of the case, it shall appear probable, that it was owing rather to the weakness than perverseness of the party, as where it was occasioned by surprise, or inadvertency, or a mistake of the true state of the question, it cannot but be hard to make it amount to voluntary and and corrupt perjury. 1 *Haw.* 172.

*False.....* It is said not to be material, whether the fact which was sworn be in itself true or false; for, however the thing sworn may happen to prove agreeable to the truth, yet if it were not known to be so by him who swears to it, his offence is altogether as great as if it had been false, inasmuch as he wilfully swears that he knows a thing to be true, which at the same time he knows nothing of, and impudently endeavours to induce those before whom he swears to proceed upon the credit of a deposition, which any stranger might make as well as he. *Ibid.* 175.

*Being lawfully required.....* It seemeth clear, that no oaths whatsoever, taken before persons acting merely in a private capacity; or before those who take upon them to administer oaths of a public nature, without legal authority; or before those who are legally authorised to administer some kinds of oaths, but not those which happen to be taken before them; or even before those who take upon them to administer justice by virtue of an authority seemingly colourable, but in truth unwarranted and merely void, can amount to perjuries, but are altogether idle and of no force. *Ibid.* 174.

*In any judicial proceeding...* For though an oath be given by him who hath lawful authority, and the same is broken, yet if it be not in a judicial proceeding, it is not perjury, because such oaths are general and extrajudicial; but it serves for aggravation of the offence. Such are, general oaths given to officers and ministers of justice, the oath of fealty and allegiance, and such like: Thus, if an officer commit extortion, it is against his general oath, but yet not perjury, because not in a judicial proceeding. but when he is charged with extortion, the breach of his oath may serve for aggravation. 3 *Inst.* 166.

If a person calleth another *perjured* man, he may have his action upon his case, because it must be intended contrary to his oath in a judicial proceeding, but for calling him a forsworn man, no action doth lie, because the forswearing may be extrajudicial. *Ibid.*

*Swears absolutely.....* For the deposition must be direct and absolute; and not, as he thinketh, or remembereth, or believeth, or the like. *Ibid.*

*Immaterial material to the point in question.....* For if it be not material, then, though it be false, yet it is no perjury, because it concerneth not the point in issue, and therefore in effect it is extrajudicial. *Ibid.* 167.

But it is not necessary that it appear to *what degree* the point, in which a man is perjured, was material to the issue; for if it is but circumstantially material, it will be perjury. *L. Raym.* 258.

Much less is it necessary, that the evidence be sufficient for the plaintiff to recover upon, for in the nature of the thing, an evidence may be very material, and yet it may not be full enough to prove directly the point in question. *Ibid.* 889.

*Whether he be believed or not...* It hath been holden, not to be material upon an indictment of perjury at common law, whether the false oath

were at all credited, or whether the party in whose prejudice it was intended were in the event any way aggrieved by it or not; inasmuch as this is not a prosecution grounded on the damage of the party, but on the abuse of public justice. 1 *Haw.* 177.

A man may be indicted for perjury, in swearing that he *believes* a fact to be true, which he must know to be false. *Leach* 270.

Subornation of perjury, by the common law, seems to be an offence, in procuring a man to take a false oath, amounting to perjury, who actually taketh such oath. 1 *Haw.* 177.

But it seemeth clear, that if the person incited to take such an oath do not actually take it, the person by whom he was incited is not guilty of subornation of perjury; yet it is certain, that he is liable to be punished, not only by fine, but also by infamous corporal punishment. *Ibid.*

## II. OF PERJURY AND SUBORNATION BY STATUTE.

“All and every person and persons, who shall unlawfully and corruptly procure any witness or witnesses, by letters, rewards, promises, or by any other sinister and unlawful labour or means whatsoever, to commit any wilful and corrupt perjury, in any matter or cause whatsoever, now depending, or which shall hereafter depend, in suit and variance, by any writ, action, bill, complaint, or information, in any wise touching or concerning any lands, tenements, or hereditaments, or any goods, chattels, debts, or damages, in any of the courts of this commonwealth; or shall likewise unlawfully and corruptly procure, or suborn, any witness or witnesses, which shall be sworn to testify *in perpetuam rei memoriam*, or any criminal prosecution, or in any examination or controversy before a justice of the peace, or before any commissioners appointed to take depositions, that then every such offender or offenders shall, for his, her, or their said offence, being thereof lawfully convicted, be adjudged to pay a fine not exceeding two hundred pounds, and to suffer imprisonment for the space of one year, without bail or mainprise. 1 *Rev. Code*, ch. 48, sect. 1, p. 46.

“If any person or persons, either by the subornation, unlawful procurement, sinister persuasion, or means of any other, or by their own act, consent or agreement, wilfully and corruptly commit any manner of wilful perjury, by his or their deposition in any of the courts of this commonwealth, or before any justice or justices of the peace, or before any commissioners appointed to take depositions, or being examined *in perpetuam rei memoriam*, that then every person and persons so offending, and being thereof duly convicted, shall, for his or their said offence, be adjudged to pay a fine not exceeding one hundred pounds, and to suffer imprisonment for the space of six months, without bail or mainprise, and the oath of such person or persons so offending, in any of the cases of perjury or subornation of perjury, in this act mentioned, from thenceforth shall not be received in any court within this commonwealth, until such time as the judgment given against such person or persons shall be reversed.” 1 *Rev. Code*, ch. 48, sect. 2, p. 47.

The following determinations have been made on statutes of England nearly similar to our act of assembly.

*Any witness....*If the defendant perjureth himself in his answer, in the chancery, or the like, he is not punishable by this statute; for it extendeth but to witnesses. 3 *Inst.* 166. 1 *Leach. Haw.* 330.

But he is punishable for the same by indictment at the common law. *Burr.* 1189.

*Either by the subornation, &c....*It is not necessary to set forth in the indictment, whether the party took the false oath through the subornation of another, or without any such subornation, these words being only superfluity. 1 *Haw.* 179.

*Wilfully and corruptly....*These words are necessary in an indictment or action on this statute, and cannot be supplied by adding, *against the form of the statute*, or by concluding, *and so a wilful and corrupt perjury did commit.* *Ibid.* 178.

See further as to this subject, 1 *Leach. Haw.* 318, 335.

Prosecutions for perjury, by statute, being more difficult than by indictment at common law, the latter is generally pursued. *Ibid.* 327.

☞ For those acts which constitute perjury, by the laws of Virginia, see 1st and 2d vols. *Rev. Code, Index*, title PERJURY.

### III. OF MATTERS COMMON TO THEM BOTH.

To convict a man of perjury, a probable evidence is not enough; but it must be a strong and clear evidence, and the witnesses must be more numerous than those on the side of the defendant, for otherwise it is only oath against oath. 10 *Mod.* 194.

And the party prejudiced by the perjury shall not be admitted to prove the perjury. *L. Raym.* 396.

The court, in special cases, will grant a *certiorari* to remove an indictment of perjury. See various instances, 2 *Leach. Haw.* 408.

So, they may either quash an indictment for perjury, for insufficiency in the caption, &c. or put the defendant to plead a demur to it. See 2 *Leach. Haw.* 367.

FOR WARRANTS, COMMITMENTS, RECOGNIZANCES, &c. see those titles; also title CRIMINALS.

FOR INDICTMENTS, see *Cr. Cir. Comp.* and *Cr. Cir. Assist.*

## PILLORY.

PILLORY is derived from *fulastere*, a pillar; because it is a wooden pillar, wherein the neck of the offender is put and pressed; a punishment inflicted on persons guilty of forgery, perjury, cheating by means of some artful device, and by several acts of assembly on other offenders, therein particularly mentioned. 3 *Inst.* 88.

This kind of punishment is very ancient, having been in use among the *Saxons*, and is held so infamous, that lord *Coke* says, those who have been adjudged to suffer it are not to be received as witnesses, or jurors; for which reason he advises justices of the peace to be well advised before they adjudge any person to the pillory, and to have good warrant for their judgment. Fine and imprisonment, for offences fineable by them, he recommends as a fair and sure way. *Ibid.* 219.

PITCH. See PORK, &c.

PLAGUE. See QUARANTINE.

POLYGAMY. See BIGAMY.

POISON. See HOMICIDE.

## POOR.

SINCE the revised act of 1792, several laws have passed on the subject of the *poor*, and in relation to the appointment and duties of the *overseers* of the *poor*. They are too lengthy for insertion in a work of this kind, but may be found in 1 *Rev. Code*, ch. 102, p. 180. *Ibid.* ch. 227, p. 377. 2 *Rev. Code*, ch. 25, p. 27. *Ibid.* ch. 50, p. 76. *Ibid.* ch. 60, p. 85, sect. 5. *Ibid.* ch. 69, p. 95, sect. 1; p. 96, 97, sect. 2, 3, 4, 5, 6, 7, 11, 12. *Ibid.* ch. 75, p. 102. *Ibid.* ch. 81, p. 108, sect. 2. *Ibid.* ch. 118, p. 147. *Ibid.* ch. 130, p. 162, sect. 5. *Sess. Acts*, 1808, ch. 19, p. 28.

(A) *Warrant of a justice to bring a person before him, to be examined concerning his settlement, on sect. 7, of 1 Rev. Code, p. 181.*

To the constable of \_\_\_\_\_ in the county of \_\_\_\_\_  
county, to wit.

Whereas complaint hath been made before me, J P, one of the commonwealth's justices of the peace for the said county, by A O, one of the overseers of the poor of the county of \_\_\_\_\_ aforesaid, that A P. hath come to inhabit in the said county, not having gained a legal settlement therein, and is likely to become chargeable to the said county. These are therefore to require you, to bring the said A P before me, to be examined concerning the place of his last legal settlement, and to be further dealt with according to law. Given under my hand and seal, the \_\_\_\_\_ day of \_\_\_\_\_ in the year \_\_\_\_\_ and in the \_\_\_\_\_ year of the commonwealth.

It has been the constant practice in England, where the power of removal from one county to another is given, in case of the illegal set-

tlement of a pauper, to summon the overseers of the poor of the county (to which it is proposed to remove him) to appear (or some of them) at a certain time and place, to contest the propriety of the order.

This is not only consonant to the principles of natural justice, which will not suffer any party to be condemned unheard, but if strictly attended to, might prevent an application to the county court, who are now authorised to determine on the legality of the pauper's residence. See *Burn's Just.* 3d vol. p. 530.

*Summons to shew cause against an order of removal.*

county, to wit.  
To the overseers of the poor of                      district, in the county of  
and to every of them.

This is to summon you, or some of you, to appear (if you shall think proper) before                      or some other justice of the peace for the said county of                      at the house of                      in the said county of                      on the                      day of                      at the hour of                      in the afternoon of the same day, to shew cause why A P should not be removed from                      district, in the county of                      to your district, in the said county of                      . Given under my hand and seal, this                      day of                      in the year

*(B) Form of an order of removal.*

county to wit.  
To the overseers of the poor of                      district, in the said county,  
and to the overseers of the poor of                      district, in the county of  
and to each and every of them.

Whereas complaint hath been made by A O, one of the overseers of the poor of                      district, in the county of                      aforesaid, before me, J P, a justice of the peace, in and for the said county of                      that A P, a poor person, hath come to inhabit in                      district, in the said county of                      not having gained a legal settlement there, and that the said A P is likely to become chargeable to the said county of                      and inasmuch as, upon due proof made thereof, as well upon the examination of the said A P, upon oath, or otherwise, and likewise upon due consideration had of the premises, I do adjudge the said complaint to be true, and do likewise adjudge, that the last legal settlement of the said A P was in                      district, in the said county of                      Therefore, I hereby require you, the said overseers of the poor of this said county of                      or some, or one of you, to convey the said A P from and out of the said                      district, in this said county of                      to the said                      district, in the said county of                      and him to deliver to the overseers of the poor there, or to some or one of them, together with this order, or else a true copy thereof, shewing to them at the same time the original. And I do also hereby require you, the said overseers of the poor of the said                      district, in the said county of                      to receive and provide for him as an inhabitant of your said county. Given under my hand and seal, &c.



See the form of an order of removal in 3 *Burn's Justice*, page 531, &c. where the form is settled from various adjudications made on exceptions taken to the different parts of orders.

*(C) Warrant against an overseer of the poor for failing to attend at an annual meeting, on sect. 20.*

county, to wit.

Whereas complaint hath been made to me, J P, a justice of the peace for the said county, by A J, that A O, an overseer of the poor for district, in the county aforesaid, did fail to attend at an annual meeting of the overseers of the poor for the said county of held at in and for the said county of on the day of last past, having no reasonable excuse for the same. These are therefore to require you to summon the said A O to appear before me, or some other justice of the peace for the said county of to shew cause why the penalty of two dollars for each day he so failed to attend should not be levied upon him, for his said offence, according to law. Given, &c.

To constable.

*(D) Order of two magistrates of a corporate town, for the removal of a poor person into the county, on section 27.*

Corporation of to wit.

Upon complaint this day made to us, J. P. and K. P., two of the magistrates for the corporation aforesaid, by A. J., of the said corporation, that A. P., a poor person, hath come to inhabit in the said corporation, not having gained a legal settlement there, nor been resident within the limits of the said town, for one year last past, and that the said A. P. is likely to become chargeable to the said corporation: We, the said magistrates, upon due proof made thereof, as well upon the examination of the said A. P., upon oath, as otherwise, and likewise upon due consideration had of the premises, do adjudge the same to be true; and we do likewise adjudge, that the lawful settlement of him the said A. P. is in the district of in the county of: We do therefore require you to convey the said A. P. from and out of the said corporation of to the said district in the said county of and him to deliver to the overseers of the poor there, or to some or one of them, together with this our order, or a true copy thereof, at the same time shewing to them the original. And we do also hereby require you, the said overseers of the poor of the said district in the said county of to receive and provide for him as an inhabitant of your district, in the said county of. Given under our hands and seals, &c.

To to execute. And to the overseers of the poor of district, in the county of and to each and every of them.

(E) *Order of two overseers of the poor, to remove a poor person, from the country into a corporate town.*

county, to wit.

Whereas complaint hath been made to us, A O and B O, two of the overseers of the poor in and for the county aforesaid, by A J, that A P, a poor person, hath come to inhabit in the said county of \_\_\_\_\_ not having gained a legal settlement there, and that the said A P is likely to become chargeable to the district of \_\_\_\_\_ in the said county of \_\_\_\_\_

: We, the said overseers of the poor, upon due proof made thereof, as well upon the examination of the said A P, upon oath, as otherwise, and likewise upon due consideration had of the premises, do adjudge the same to be true; and we do likewise adjudge, that the lawful settlement of the said A P is within the corporation of \_\_\_\_\_ it appearing to us, from due proof, that the residence of the said A P for one year last past, was within the limits of the said corporation of \_\_\_\_\_

: We do therefore require you to convey the said A P from \_\_\_\_\_ and out of the said \_\_\_\_\_ district, in the said county of \_\_\_\_\_ to the said corporation of \_\_\_\_\_ and him to deliver to the magistrates of the said corporation of \_\_\_\_\_ there, or to some or one of them; together with this our order, or a true copy thereof, at the same time shewing to them the original. And we do also hereby require you, the magistrates of the said corporation, to receive and provide for him as an inhabitant of your said corporation. Given under our hands and seals, the \_\_\_\_\_ day of \_\_\_\_\_ in the year \_\_\_\_\_ and in the \_\_\_\_\_ year of the commonwealth.

To \_\_\_\_\_ to execute. And to the magistrates of the corporation of \_\_\_\_\_

NOTE....In all cases where a man, his wife, and children, are removed; or wherever a parent, and a child or children are removed, the age and sexes of the children must be particularly mentioned, as well as the names of the parents and children, if known; if not, describe them as persons of such ages, and sexes; whose names are unknown. See various instances in 3 *Burn's Justice*, 536, &c. where orders have been quashed for such omissions.

The acts which will constitute a legal settlement in this state being but few indeed in comparison to those of England, much of the doctrine relating to the poor laws, which has employed the attention of so many writers in that country, is useless in this commonwealth. For, by the act first referred to (1 *Rev. Code*, p. 186, sect. 35.) "no person shall be accounted an inhabitant, so as to have gained a legal settlement, until such person shall have been actually resident in the county wherein he shall claim a legal settlement for the space of one whole year."

Mr. Starke (*Virg. Just.* p. 278.) seems to think that a settlement may also be acquired by birth and marriage, although not mentioned in the act of assembly. See 3 *Burn's Just.* 360, 455.

By the eighth section of the above law, "where any dispute shall arise respecting the residence of any poor persons, the court of any county adjacent is authorised to take cognizance thereof, and to determine the same."

The ease with which all the necessaries of life may be acquired in this state, the high price of labour, together with the native independence of its citizens, prevents an application to the overseers of the poor for relief, while there is a possibility of supporting human nature without it. Our proportion of poor then, to be provided for by the county, is small; and consequently few, or perhaps no adjudications have yet been made on the subject of removals. But should the increase of the poor, at some future day, when our country becomes more populous, be so great as to make it an object with the several counties charged with their support, to compel them to remain in their proper settlements, it will be found necessary to recur to the various adjudications which have been made in England on similar points. These will be found very judiciously arranged in doctor *Burn's Justice*, title *Poor*, to which I must at present refer.

Other matters relating to poor children will be found under titles *APPRENTICES* and *BASTARDS*. And as to the duty of overseers of the poor, in relation to slaves, see title *SLAVES*.

## PORK, BEEF, TAR, PITCH AND TURPENTINE.

SEE *Virginia Laws* (1 Rev. Code, ch. 128, p. 241.) where all the acts of assembly on this subject are collected.

### (A) Warrant against an inspector, on sect. 1.

To  
county, to wit.  
constable of the said county.

Whereas complaint and information hath this day been made to me, J P, a justice of the peace for this county, by A J, upon oath, that L J, inspector of pork, beef, tar, &c. within the said county, did, on the day of last (or of this instant) stamp, or brand barrels of pork, the property of A M, of with the letter L, denoting large, which said barrels did contain small pork (or barrels of pork or beef, containing less than two hundred and four pounds nett; or, of dirty, unsound meat, &c. as the case may be; or, if for breach of duty against any other part of the said act, describe the offense) contrary to the act of the general assembly, in that case made and provided. These are therefore, in the name of the commonwealth, to require you to cause the said L J to come before me, or some other justice of the peace for this county, to answer the said complaint. And have then there this warrant, with your return of the execution of the same. Given, &c.

*Judgment.*

Upon hearing the within complaint, it being duly proved before me, that the within named L J is guilty, and did, &c. (according to the warrant) whereby he hath incurred the forfeiture of (four dollars for each barrel so stamped, or branded, &c. if for tar, pitch, or turpentine, the penalty is one dollar for each barrel marked, &c. contrary to law) it is therefore considered that the within named A J recover against the said L J dollars, being the amount of the forfeiture for barrels, together with his costs in his behalf expended. Given under my hand, at &c.

Costs cents.

NOTE.... That where the penalties on several barrels amount to more than five dollars (the extent of a single magistrate's jurisdiction) the same may, nevertheless, be recovered before a single magistrate, and execution awarded for the amount. See sect. 4.

*Execution for the penalty.*

county, to wit.

To constable for the said county.

Whereas it was this day duly proved before me, J P, one of the commonwealth's justices of the peace for the said county, upon the complaint of A J, that L J, inspector of pork, &c. within the said county, did, &c. (according to the complaint) contrary to the act of the general assembly, in that case made and provided, whereby he hath forfeited the sum of together with cents for his costs, to the said A J, for his own use. Therefore I command you forthwith to levy the same, by distress and sale of the said L J's goods and chattels, rendering him the overplus, if any; and that you pay the said sum of together with the costs aforesaid, to the said A J, and make return how you have executed this warrant. Given under my hand and seal, &c.

*Inspector's Certificate.*

(Under the brand, &c. of the several casks, on the same piece of paper, write)

county, to wit.

I do hereby certify, that barrels of &c. (describe the kind) marked and branded as above, is &c. (give then the qualities required by the act.) Given under my hand, &c. at on the day, &c.

(B) Warrant against the seller of pork, tar, &c. on sect. 4.

Whereas, &c. (as in the first warrant) that A M, of in the county of on the day of did sell to (or barter with) N J, of barrels of pork (beef, tar, &c. as the case

may be) containing only                      pounds (or gallons) each (or not branded or inspected, as the case may be) contrary to the act of the general assembly, in that case made and provided: These are, &c.

*The judgment and proceedings as under the first warrant.*

If the defendant prays an appeal, the justice should take his bond, with security, in double the sum recovered, payable to the plaintiff, and with the following condition:

The condition of the above obligation is such, that whereas the above named A J hath obtained judgment, upon warrant, before me, J P, one of the commonwealth's justices of the peace for the county of                      against the above bound L J, for                      being the amount of the forfeiture for                      barrels of pork, &c. sold to or bartered with N J, of the said county. (or not inspected according to law, as the case may be) from which judgment the said L J hath prayed an appeal to the next court to be held for the said county of                      : Now, if the said L J shall prosecute the said appeal with effect, and perform the court's order and judgment therein, then this obligation to be void, else to remain in full force and virtue.

☞ The form of making up a record may be seen under title GAMING.

(C) *The oath of a seller or exporter of pork, beef, tar, pitch or turpentine.*

You shall swear, that the pork, &c. contained in                      barrels marked and numbered as above, and by you sold and delivered to A M, of                      (or by you delivered out, to be exported to                      ) is the identical pork, &c. which was inspected and passed by the inspector legally appointed, who marked and branded the same as above; and that each barrel doth contain the full quantity, without embezzlement or alteration, to your knowledge. So help you God.

The warrant against a cooper, for making his barrels contrary to the direction of the seventh section of the law, as well as for omitting to stamp or brand his name, at full length, on each barrel, may easily be formed from the first warrant under this title.

POSSE COMITATUS. See ARREST.

## PRESENTMENT.

A PRESENTMENT [is one of the modes of commencing a prosecution, and] *generally* taken, is a very comprehensive term ; including not only presentments properly so called, but also inquisitions of office, and indictments by a grand jury. A presentment, *properly* speaking, is the notice taken by the grand jury of any offence, from their own knowledge or observation, without any bill of indictment laid before them at the suit of the commonwealth. As the presentment of a nuisance, a libel, and the like ; upon which the officer of the court must afterwards frame an indictment, before the party presented can be put to answer it. An *inquisition* of office is the act of a jury summoned by the proper officer to inquire of matters relating to the commonwealth, upon evidence laid before them. Some of these are in themselves convictions, and cannot afterwards be traversed or denied ; and therefore the inquest, or jury, ought to hear all that can be alleged on both sides. Of this nature are all inquisitions of *felo de se*, of flights of persons accused of felony, &c. Other inquisitions may be afterwards traversed and examined ; as particularly the coroner's inquisition of the death of a man, when it finds any one guilty of homicide ; for in such cases the offender so presented must be arraigned upon this inquisition, and may dispute the truth of it ; which brings it to a kind of indictment, the most usual and effectual means of prosecution. 4 Bl. Com. 301.

As to presentments in the county and superior courts of law, and the process thereon, see 1 Rev. Code, ch. 73, p. 100, sect. 5, 6, 9. & 3 Hen. & Munf. 575.

## PRISON BREAKING.

AT the common law, all prison breaches were felonies, if the party were lawfully in custody for any cause whatsoever. 2 Haw. 123.

But by the laws of *Virginia* (1 Rev. Code, ch. 173, p. 322) it is declared, ' That none from henceforth, who, being in actual jail, breaketh prison, shall have judgment of life or member for breaking prison only, except the cause for which he was taken and imprisoned did re-

quire such judgment, if he had been convicted thereupon according to the law of the land.

If the prison be broken by a stranger, and not by the prisoner, or by his procurement, this is no felony in the prisoner. *Hale's Pl. 108.*

It seems clear, that any place whatsoever, wherein a person under a lawful arrest for a supposed crime is restrained of his liberty, whether in the stocks or street, or in the common jail, or the house of a constable, or private person, is properly a prison; for imprisonment is nothing else but a restraint of liberty. 2 *Haw. 124.*

And therefore this extendeth as well to a prison in law, as to a prison in deed. 2 *Inst. 589.*

But there must be an actual *breaking*; for if the door be open, and he goes out, it is not felony, but a misdemeanor only. 2 *Inst. 589. 2 Haw. 125.*

But if the prison be fired without the privity of the prisoner, he may lawfully break it to save his life. *Hale's Pl. 108.*

Also, it seems that no breach of prison will amount to felony, unless the prisoner escape. 2 *Haw. 125.*

*False imprisonment* is not within this act. 2 *Inst. 590.*

Imprisonment is the restraint of a man's liberty under the custody of another, by lawful warrant, in deed, or in law. Lawful warrant is, either when the offence appeareth by matter of record, as when the party is taken upon an indictment, or when it doth not appear by matter of record, as when a felony is done, and the offender by a lawful *mittimus* is committed to a jail for the same. But between these two cases there is a great diversity; for in the first case, whether any felony were committed or no, if the offender be taken by force of a *capias*, the warrant is lawful, and if he breaks prison it is felony, although no felony were committed; but in the other case, if no felony be done at all, and yet he is committed to prison for a supposed felony, and break prison, this is no felony, for there is no *cause*. 2 *Inst. 590.*

So that the cause must be just, and not feigned, for things feigned require no judgment. Thus if a man give another a mortal wound, for which he is committed to prison, and breaketh prison, and the other dieth of the wound within the year, this death hath relation to the stroke; but because relations are but fictions in law, and fictions are not here intended, this prison breaking is not felony. 2 *Inst. 591.*

So that the offence for which the party was imprisoned must be a capital one at the time of the offence, and not become such by a matter subsequent. 2 *Haw. 126.*

And the cause must be expressed in the *mittimus*, although not so certainly as in an indictment, yet with such convenient certainty as it may appear judicially that the offence requireth such judgment; as not for felony generally, but for felony in stealing such a horse, and the like. 2 *Inst. 591.*

But if the offence for which the party is committed be supposed in the *mittimus* to be of such a nature as requires a capital judgment, yet if in the event it be found to be of an inferior nature, and not to require such a judgment, it seems difficult to maintain, that the breaking of the prison, on a commitment for it, can be felony. 2 *Haw. 126.*

But if a man be committed by lawful warrant, for *suspicion* of felony done, if he break prison, he may be indicted for that escape, albeit the

commitment be for suspicion of felony, and yet no judgment can be given against him for suspicion, but for the felony itself, whereof he is suspected. 2 Inst. 592.

And an indictment that such a person *feloniously broke the prison* generally, is not good; but it ought to rehearse the specialty of the matter, that he, being imprisoned for such or such a felony, broke the prison. 2 Inst. 591.

But if the party be only arrested for, and in his *mittimus* charged with a crime, which doth not require judgment of life or member, as petit larceny, or homicide by self defence or by misadventure, and the offence be in truth no greater than the *mittimus* doth suppose it to be, it is clear, from the express words of the statute, that the breaking of the prison cannot amount to felony. 2 Haw. 126.

But if a felony be made by a subsequent statute, and an offender is committed thereupon; if he breaks prison, it is felony. For, since all breaches of prison were felonies by the common law, which is restrained by this statute in respect only of imprisonment for offences not capital; when an offence becomes capital, it is as much out of the benefit of the statute, as if it had always been so. Hale's Pl. 108. 2 Haw. 126.

Also, it is said, that the party may be arraigned for prison breaking, before he be convicted of the crime for which he was imprisoned: for that is not material whether he was guilty of such crime or not. 2 Haw. 127.

But if he is first indicted and acquitted of the principal felony, he shall not be indicted for the breach of prison afterwards; for it being cleared that he was not guilty of the felony, he is in law as a person never committed for felony, and so his breach of prison is no felony. 1 H. H. 612.

But the jailer shall not be punished as a felon for the party's breach of prison, unless he voluntarily consented to it; but it seems to be a negligent escape in the jailer, by which he may be punished by fine and imprisonment, because there wanted either that due strength in the jail, or that due vigilance in the jailer or his officers, that should have prevented it; and if jailers might not be punished for this as a negligent escape, they would be careless either to secure their prisoners, or to take them that escape. 1 H. H. 601.

And therefore if a criminal, endeavouring to break the jail, assault his jailer, he may be lawfully killed by him in the affray. 1 Haw. 71.

### *Indictment for breaking out of jail.*

county, to wit.

The jurors for the commonwealth upon their oath present, that A O, late of in the county aforesaid, labourer, on the day of in the year of the commonwealth, at aforesaid, in the county aforesaid, was arrested, imprisoned, and detained in the jail of the commonwealth, for a certain felony by him committed, that is to say, for the felonious taking and carrying away one black gelding, the property of of the value of and that he the said A O, on the day of in the year aforesaid, with force and arms, the aforesaid jail of the commonwealth, at aforesaid, in the county aforesaid, feloniously did break, and thereby did escape from and



out of the said jail, against the peace and dignity of the commonwealth.

So much of prison breaking as falls under the legal notion of an escape, both in *criminal* and *civil* cases, will be found under title *Escapes*. It will therefore be sufficient in this place, to refer to that title for precedents. See the act of assembly in the *Revised Code*, ch. 79, as to escapes in *civil* cases.

The magistrate should always be particular in expressing the cause of commitment, prior to the escape.

## PROCESS.

1. PROCESS is so called, because it *proceedeth* or goeth out upon former matter, either original or judicial. (*Lamb*. 519.) Before presentment or indictment, it is called a *warrant*; after presentment or indictment, it is properly called *process*. *Dalt.* c. 193.

2. In a presentment to the county or corporation court, if the penalty of the offence exceed not five dollars, or three hundred pounds of tobacco, or to the district court (now the superior court of law) if the penalty exceed not twenty dollars, or one thousand pounds of tobacco, no information (or indictment) thereupon shall be filed; but a summons shall be issued against the defendant to answer the presentment. And if the prosecution be in the county or corporation court, if he do not appear, having ten days notice, the court may enter judgment against him for the penalty; and if he do appear, the court shall proceed to hear and determine the matter of the presentment, in a summary way, without a jury, and without regard to any matter of form. (1 *Rev. Code*, ch. 73, sect. 6, p. 100.) The grand jury of a county or corporation may present all offences made penal by the laws of Virginia; although the recovery of the fines for the same may be otherwise directed, and although such fines do not amount to five dollars, or two hundred pounds of tobacco. But the grand juries in the district courts cannot present any offence, where the penalty is under the sum of five dollars, or two hundred pounds of tobacco. 1 *Rev. Code*, ch. 73, sect. 5, p. 100, & sect. 9, p. 101.

3. Upon a presentment made by the grand jury, of an offence not capital, the court shall order the clerk to issue a summons, or other proper process, against the person or persons so presented, to appear and answer the same at the next court. 1 *Rev. Code*, ch. 74, sect. 28, p. 106.

4. When the grand jury shall have presented to the district court a bill of indictment against any person charged with treason or felony, if he be not already in custody, the sheriff shall be commanded to at-

tach his body by writ, or by precept, which is called a *capias*; and if he return that the body is not found, another writ or precept of *capias* shall be immediately made returnable forthwith, in which the sheriff shall also be commanded to seize his chattels and safely to keep them; and if he return that the body is not found, and the indictce cometh not, an *exigent* shall be awarded, and the chattels shall be sequestered; but if he come and yield himself, or be taken before the return of the fourth *capias*, the goods and chattels shall be saved to him; otherwise they shall go, descend, and pass in like manner, as is by law directed in case of persons dying intestate. 1 Rev. Code, ch. 74, sect. 5, p. 103, & sect. 31, p. 106.

5. If the defendant be taken upon the writ of a *capias*, or appear upon the return thereof, or of the *exigent*, the practice hath been (in some cases) to award a *venire facias*, directed to the sheriff of the county where the offence was committed, and returnable some certain day in the same term (or in the next term, if there be not time enough for the trial to be had in the same term) commanding him to summon a jury of freeholders of his county, qualified as the law directs, to appear on a day therein prescribed, to serve as jurors for the trial of the accused. And the clerk issues *subpoenas* for the witnesses, as well for the prisoner, if he have any, as for the commonwealth, to attend the trial at the same time. And this practice may now be considered as settled, having received the sanction of the general court, in *Thomas Blakeley's case*. Note 7 to 4 *Tucker's Blackstone*, 320.

6. In the case of *the commonwealth against M. Clenegan* (which was adjourned from the district court of Morgantown to the general court) the court was unanimously of opinion, that where an indictment or presentment is found by a grand jury against any person, for a misdemeanor, to which the law has affixed an infamous or corporal punishment, that the court before whom such presentment or indictment is found may, in its discretion, award a *capias* in the first instance; and that, upon indictments and presentments of an inferior nature, such court ought, after two *venire facias* have been returned not found, to award a *capias*. 3 *Hen. & Munf.* 575.

7. The ordinary processes upon all indictments for crimes of an inferior nature, that is, under the degrees of treason, felony, or maihem, are as follow: *First*, if the offender be absent, a *venire facias*, which is but in the nature of a summons to cause the party to appear, shall be awarded, except where other process is directed by some statute. *Haw. B. 2. ch. 27, sect. 9.*

8. If it appear by the return of such *venire*, that the party hath lands in the county, whereby he may be distrained, the *distress infinite* shall be awarded from time to time, till he doth appear; and by force thereof he shall forfeit on every default so much as the sheriff shall return upon him in issues. But if a *nil* be returned on such a *venire*, then three *capias's*, that is, a *capias*, *alias*, and *pluries*, shall issue. (*Ibid.* See *ant. div.* 6.) But a *capias* is the first process on all indictments of treason or felony. *Haw. B. 2. ch. 27, sect. 15.* See *ant. div.* 6.

9. Where the inhabitants of a parish are indicted or presented, the process is first a *venire*, then a *distringas*. *Crown. Cir.* 21.

10. If a defendant appear to an indictment of felony, and afterwards before issue joined make an escape, either from his bail, or from pri-

son, the common *capias*, *alias*, and *pluries* shall be awarded against him, unless there had been an *exigent* before, in which case a new *exigent* shall be awarded. 2 *Haw.* 285.

11. Concerning the execution of the process, it is laid down as a general rule, that wherever the commonwealth is a party to the suit (as it certainly is to all informations and indictments) the process ought to be executed by the sheriff himself (or any of his lawful deputies) but not by the bailiff of a franchise. 2 *Haw.* 284.

12. And if the party be in a house, if the doors be shut, and the sheriff (having given notice of his process) demand admittance, and the doors be not opened, he may break open the doors and enter, to take the offender. 2 *Hale* 202.

13. But no person, on the Lord's day, shall serve, or cause to be served, any writ, process, or warrant, order, or judgment (except in cases of treason, felony, or breach of the peace) but the service thereof shall be void. [See title *Sabbath*.]

14. It seems to be agreed, that every suit, whether civil or criminal, and also every process in such suit against jurors, ought to be properly continued from day to day, from its commencement to its conclusion, without any the least gap or chasm; and the suffering any such gap or chasm is properly called a *discontinuance*; and the continuing the suit by improper process (as by a *capias* instead of a *distingas*) or by giving the parties an illegal day, is properly called a *miscontinuance*; and if the justices, before whom the matter is depending, do not come on the day to which it is continued, it is said to be *put without day*, and cannot be revived without a re-summons or re-attachment. (*Haw. B. 2. c. 27, sect. 89.*) Now process may be discontinued several ways. As, 1. Where the second is not tested on the very same day on which the first is returnable. 2. Where there is a sessions intervening between the teste and the return of a *capias*, that the defendant may not be imprisoned an unreasonable time. But it is no objection to an *exigent*, that it is not returnable the next sessions, because it must allow time for five counties to be holden between its teste and return. 3. Where, after issue or demurrer, the court gives the party a day to a distant sessions, without making any continuance to that immediately following. 4. Where the sessions to which the suit is continued is adjourned, and the suit is not adjourned accordingly. 5. Where any of the parties are described in any continuance of the suit, whether on the roll or by process, by a name or addition variant from those in the original, though only in one letter. 6. Where a *venire* or *distingas* are issued, without any award on the roll to warrant them. 2 *Haw.* 298, 299.

And it seems generally to be taken as an undoubted principle, that a discontinuance, by suffering a total chasm in the proceedings, whether on the roll or in the process, by not giving a fresh continuance instantly upon the determination of the precedent, shall never be aided by any appearance or pleading over. But it is holden by the greater number of authorities, that if the original be good, and the defendant present in court, he shall be compelled to answer to such original, let the process whereon he came in, or the execution of it, be never so erroneous or defective, so that it never were discontinued; for the end of process is to compel an attendance, and the end being served, and

a legal charge appearing against the defendant, no way discontinued, the law will not so far regard a slip in the process, as to let the defendant out of court, in order only to have him brought in again in better form. 2 *Haw.* 300.

15. The processes as well of *capias* as of outlawry may be stayed by a *supercedas* issuing from other justices (out of sessions) testifying that the party hath come before them, and hath found sureties for his appearance to answer to the indictment, or pay his fine. *Dalt.* c. 193.

16. Judgment of outlawry is given by the coroner at the fifth county court, upon the parties not appearing to the *exigent* (which is a writ commanding the sheriff to cause the defendant (*exigi*) to be demanded from county court to county court, until he be outlawed.) And such judgment is entered thus, *Therefore by the judgment of the coroners of the commonwealth, of the county aforesaid, he is outlawed.* 2 *Haw.* 446.

17. The word *outlaw* (*utlaghe*) *utlagatus* cometh not immediately from the Latin *lex*, but is derived to us through the Saxon *laga*, which signifieth law. And a person outlawed signifies one that is out of the protection of the commonwealth, and out of the aid of the law. 4 *Burn's Just.* 53.

18. And a man that is outlawed is called *outlawed*; but a woman who is outlawed is called *waived*, and not *utlagata*; for that women are not sworn in leets or tornes, as men who are at the age of twelve or more are; and therefore men may be called *utlagati*, that is, *extra legem positi*, but women are *waviatæ*, that is, *derelictæ*, left out, or not regarded, because they were not sworn to the law; wherein it is to be noted, that of ancient time a man was not said to be within the law, that was not sworn to the law, which is intended of the oath of allegiance in the leet. (1 *Inst.* 122.) And hence it is, that a woman under the age of twelve years cannot be outlawed. † *Inst.* 122.

19. Process of outlawry lies in all indictments of treason or felony, and on all returns of a rescous; and also, on all indictments of trespass with force and arms; and it seems probable that it lies on an indictment of conspiracy or deceit, or any other crime of a higher nature than a trespass with force and arms; but not on any indictment for a crime of an inferior nature. And it seems agreed, that it lies not on any action on a statute, unless it be given by such statute, either expressly or impliedly, as where a recovery is given by an action wherein such process lay before, as on a writ of trespass for a forcible entry, because the statute expressly gives a recovery by such a writ, and such process lies in it by the common law. 2 *Haw.* 302, 303.

20. If there are two coroners in a county, or more, one may execute the writ, as in case of an *exigent*, but the return must be in the name of the coroners. 2 *Hale* 56.

21. And the return of the outlawry must be certain; it must shew where the county court was held, and in what county; and must return the day and year to every *exactus*. 2 *Hale* 203.

22. And also, the sheriff's name and office must be subscribed to the return of the *exigent*. 2 *Hale* 204.

23. If a person be outlawed at the suit of one man, all men shall take advantage of this personal disability. 1 *Inst.* 128.

24. But such disability abateth not the writ, but only disableth the plaintiff, until he obtain a charter of pardon. 1 *Inst.* 128.

25. Upon outlawry in treason or felony, the offender shall lose and forfeit as much as if he had appeared, and judgment had been given against him, as long as the outlawry is in force. 2 *Haw.* 446.

26. But the outlawry for a misdemeanor doth not inure as a conviction for the offence, as it doth in cases of treason and felony; but as a conviction of the contempt for not answering, which contempt is therefore punished, not by fine as a conviction for the offence, but by forfeiture of goods and chattels for the contempt. 2 *Salk.* 494.

27. In ancient times no man could have been outlawed but for felony, the punishment whereof was death; and upon this account an outlawed man was called *wolfeshead*, because he might be put to death by any man, as a *wolf*, that hateful beast might. But in the beginning of the reign of *K. Edw. III.* it was resolved by the judges, for avoiding of inhumanity, and of effusion of christain blood, that it should not be lawful for any man but the sheriff, having lawful warrant, to put to death any man outlawed, though it were for felony, and if he did, he should undergo such pain of death as if he had killed any other man; and so the law continueth to this day. 1 *Inst.* 28.

28. Where clergy is allowable, it shall be as much allowed to one who is outlawed, as to one who is convicted by verdict or confession. 2 *Haw.* 343.

29. But a statute taking the benefit of clergy from those who shall be found guilty, doth not thereby take it from those who are outlawed. 2 *Haw.* 343.

30. Where a person is outlawed, the defendant may shew all the matter and outlawry returned of record, and demand judgment, if he shall be answered, because he is out of the law, to sue an action during the time he is outlawed. 1 *Inst.* 128.

31. It seems to be a good challenge of a juror, that he is outlawed, either for a criminal matter, or, as some say, in a personal action; but not a principal challenge, but only to the favour, unless the record of the outlawry be produced. 2 *Haw.* 215, 417.

32. But it seems clear, that outlawry in a personal action is not a good exception against a witness, as it is against a juror. 2 *Haw.* 443.

33. An outlawed person may make a will, and have executors or administrators. *Cro. El.* 575.

34. And an executor may reverse the authority of the testator, where he was not lawfully outlawed. 1 *Leon.* 325.

35. Outlawry may be reversed several ways; as by procuring a *supercedas*, and delivering it to the sheriff before the *quinto exactus*, or by shewing any matter apparent on record, which makes the outlawry erroneous, as the want of an original, or the omission of process, or want of form in a writ of proclamation, or a return by a person appearing not to be sheriff, or a variance between the original and exigent or other process, or by a misnomer, or want of addition. 2 *Haw.* c. 50.

36. And upon a writ of error upon an outlawry in felony, the party outlawed must render himself in custody, and pray the allowance of the writ of error in person; and if the outlawry be reversed, he shall be put to answer the indictment. 2 Hale 209.

## QUARANTINE.

QUARANTINE is a space of forty days; thus where the law says a widow shall remain in her husband's capital mansion-house forty days after his death, during which time her dower shall be assigned her, these forty days are called the widow's *quarantine*. So where persons coming from infected countries are obliged to wait forty days, before they are permitted to land; this is called performing quarantine. 2 Bl. Com. 135.

The regulations prescribed by the laws of this commonwealth for performing quarantine, containing nothing which relates particularly to the office of a single magistrate, it will be sufficient in this place to refer to the laws on that subject. See 1 Rev. Code, ch. 129, p. 244. *Ibid.* ch. 159, p. 313. *Ibid.* ch. 194, p. 349.

## RAPE.

*I. What it is. II. Evidence on an indictment of rape. III. Punishment of rape. IV. Principal and accessory.*

### I. WHAT IT IS.

RAPE is an offence in having unlawful and carnal knowledge of a woman, by force, and against her will. But it is said, that no assault upon a woman, in order to ravish her, however shameless and outrageous it may be, if it proceed not to some degree of penetration, and also of emission,\* can amount to a rape; however it is said that

\* As to the necessity of emission, there seems to be much doubt, the greatest judges differing in opinion on the point; a majority, however, seem to favour the above doctrine, that there must be both penetration and emission. See 1 East's Cr. L. 436. *et seq.* where this case is very well reviewed.

emission is, *prima facie*, an evidence of penetration. *Haw. B. 1. c. 41. sect. 1.*

The offence of rape is no way mitigated by shewing that the woman at last yielded to the violence, if such her consent was forced for fear of death, or of duress. 1 *Haw. 108.*

Also, it is not a sufficient excuse in the ravisher, to prove that the woman is a common strumpet; for she is still under the protection of the law, and may not be forced. *Ibid.*

Nor is it any excuse that she consented after the fact. *Ibid.*

It is said by Mr. Dalton, that if a woman, at the time of the supposed rape, do conceive with child by the supposed ravisher, this is no rape, for (he says) a woman cannot conceive, except she doth consent, and this he hath from Stamford and Britton, and Finch. *Dalt. c. 160.*

But Mr. Hawkins observes, that this opinion seems very questionable; not only because the previous violence is no way extenuated by such subsequent consent, but also, because if it were necessary to shew that the woman did not conceive, the offender could not be tried till such time as it might appear whether she did or not, and likewise because the philosophy of this notion may be very well doubted of. 1 *Haw. 108.*

And lord Hale says, this opinion in Dalton seems to be no law. 1 *H. H. 731.*

## II. EVIDENCE ON AN INDICTMENT OF RAPE.

The party ravished may give evidence on oath, and is in law a competent witness; but the credibility of her testimony, and how far forth she is to be believed, must be left to the jury, and is more or less credible, according to the circumstances of fact that concur in that testimony. 1 *H. H. 633.*

For instance, if the witness be of good fame; if she presently discovered the offence, and made pursuit after the offender; if she showed circumstances and signs of the injury, whereof many are of that nature, that only women are the most proper examiners and inspectors; if the place, wherein the fact was done, was remote from people, inhabitants, or passengers; if the offender fled for it: these, and the like, are concurring evidences, to give greater probability to her testimony, when proved by others as well as herself. *Ibid.*

But on the other side, if she concealed the injury for any considerable time, after she had opportunity to complain; if the place where the fact was supposed to be committed were near to inhabitants, or common recourse or passage of passengers, and she make no outcry when the fact was supposed to be done, when and where it is probable she might be heard by others; or, if a man prove himself to be in another place, or in other company, at the time she charges him with the fact; or if she is wrong in the description of the place, or swears the fact was done in a place where it was impossible the man could have access to her at that time, as if the room was locked up, and the key in the custody of another person; these and the like circumstances carry a strong presumption that her testimony is false or feigned, *Ibid.*

Sir Matthew Hale says, if the rape be charged to be committed on an infant under twelve years of age, she may still be a competent witness, if she hath sense and understanding to know the nature and obligation of an oath; and even if she hath not, he thinks that she ought to be heard without oath, to give the court information; though that alone will not be sufficient to convict the offender. And he is of this opinion, first, because the nature of the offence being secret, there may be no other possible proof of the actual fact; though afterwards there may be concurrent circumstances to corroborate it, proved by other witnesses; and, secondly, because the law allows what the child told her mother or other relations to be given in evidence, since the nature of the case admits frequently of no better proof; and there is much more reason for the court to hear the narration of the child herself, than to receive it at second hand from those who swear they heard her say so. *Ibid.* 634.

And sir William Blackstone says, it seems now to be settled, that in such cases infants of any age are to be heard; and if they have any idea of an oath, to be also sworn: it being found by experience, that infants of very tender years often give the truest and clearest testimony. But, whether the child be sworn or not, it is to be wished, in order to render her evidence credible, that there should be some concurrent testimony, of time, place, and circumstances, in order to make out the fact; and that the conviction should not be grounded singly on the unsupported accusation of an infant under years of discretion. (4 *Bl. Com.* 214.)

See also, as to this point, 1 *East's Cr. L.* 441, *et seq.* where the result of the cases is, that an infant of any age, even of five years, must be sworn. *Ibid.* 444.

In the case of Omichund and Barker, in 1744, in chancery, before the lord chancellor Hardwicke, assisted by the lord chief justice Lee, lord chief justice Willes, and lord chief baron Parker, the lord chief justice Lee interrupted the attorney general, sir Dudley Ryder, asserting, on the authority of lord Hale that a child may be examined without oath; and said it had been determined at the Old Bailey, on mature consideration, that a child shall not be admitted as an evidence without oath. And the lord chief baron Parker said, it was so ruled at Kingston assizes before lord Raymond, where, upon an indictment for a rape, he refused the evidence of a child without oath. 1 *Atk.* 29.

Which case at Kingston assizes was as follows: The defendant, at the summer assizes, 1725, was indicted for a rape on the body of a child, then little more than six years old. And because the lord chief baron Gilbert, then judge of assize, refused to admit the child as an evidence against him, he was acquitted. But at the same assizes an indictment was found against him, for an assault, with an intent to ravish the said child. And this indictment coming to be tried at the next assizes, before the lord chief justice Raymond, the same objection was taken, that the girl, being now but seven years of age, could not be a witness. It was insisted, that it had formerly been held that none, under twelve years of age, could be admitted to be a witness, and that a child of six or seven years of age, in point of reason and understanding, is incompetent. On the other side, it was said, that in capi-



tal cases, which concerned life, this objection might be allowed; but in cases of misdemeanor only, as this was, such a witness might be admitted: they insisted, that the objection only went to the credit of the witness, and Hale says, that the examination of one of the age of nine years has been admitted; and a case at the Old Bailey, 1698, was cited; where, upon such an indictment as this, Ward chief baron admitted one to be a witness who was under the age of ten years, as the child had been examined about the nature of an oath, and had given a reasonable account of it. But Raymond chief justice held, that there was no difference between offences capital and lesser offences in this respect; and that a person who could not be a witness in the one case, could not in the other. The reason why the law prohibits the evidence of a child so young is, because the child cannot be presumed to distinguish between right and wrong; no person has ever been admitted as a witness under the age of nine years, and very seldom under ten. At the Old Bailey, in 1704, this point was thoroughly debated in the case of one Steward, who was indicted on two indictments for rapes upon children. The first was a child of ten years and ten months, and yet that child was not admitted as a witness, before other evidence was given in of strong circumstances, as to the guilt of the defendant, and before the child had given a good account of the nature of an oath. The second indictment against Steward was attempted to be maintained by the evidence of a child of between six and seven years of age: but it was unanimously agreed, that a child so young could not be admitted to be an evidence, and the child's testimony was rejected, without inquiring into any circumstances to give it credit. And it was merely upon the authority of Hale, where it is said that a child of ten years of age may be a witness, that the other child of that age was admitted to be a witness in the first indictment. And in the present case, the child was refused to be a witness. And there not being evidence sufficient without her, the defendant was acquitted. *Str.* 700.

But after all, it is said to have been determined lately by all the judges upon conference, that in no case shall the testimony of an infant be admitted without oath. See 1 *East's Cr. L.* 444.

Upon the whole, rape, it is true, is a most detestable crime, and therefore ought severely and impartially to be punished with death; but it must be remembered, that it is an accusation easily to be made, and hard to be proved, and harder to be defended by the party accused, though never so innocent. Therefore a wise jury will be cautious upon trials of offences of this nature, that they be not so much transported with indignation at the heinousness of the offence, as to be over hastily carried to the conviction of the person accused thereof; by the confident testimony sometimes of malicious and false witnesses. 1 *H. H.* 635, 636.

### III. PUNISHMENT OF RAPE.

Of old time rape was felony, for which the offender was to suffer death: afterwards the offence was made lesser, and the punishment changed from death to the loss of those members whereby he offended; that is to say, it was changed to castration and loss of his eyes, un-

less she that was ravished, before judgment, demanded him for her husband. 2 *Inst.* 180. 4 *Bl. Com.* 211.

By *Virginia Laws* (1 *Rev. Code*, ch. 130, sect. 1, p. 245.) "if any man do ravish a woman married, maid, or other, where she did not consent before nor after; or shall ravish a woman married, maid, or other, with force, although she consent after, the person so offending shall be adjudged a felon, and shall suffer death as in case of felony, without the benefit of clergy."

☞ But rape is now punishable by confinement in the penitentiary, for a period not less than ten nor more than twenty-one years. 1 *Rev. Code*, p. 356, sect. 4.

"If any person shall unlawfully and carnally know and abuse any woman child, under the age of ten years, every such unlawful and carnal knowledge shall be felony, and the offender, being duly convicted thereof, shall suffer as a felon, without benefit of clergy." *Ibid.* ch. 130, sect. 2, p. 245.

☞ But this being a non-enumerated offence, is now punishable by confinement in the penitentiary, not less than one nor more than ten years. *Ibid.* p. 402.

If a slave attempt a rape on a white, he may be punished by castration. *Ibid.* ch. 103, p. 188, sect. 18.

So, an actual rape committed by a slave, or the carnal knowledge and abuse of a female child, is punishable by death, the penitentiary system not embracing the case of a slave. See 1 *Rev. Code*, ch. 130, p. 245. *Ibid.* ch. 200, p. 355.

#### IV. PRINCIPAL AND ACCESSORY.

Mr. Hawkins says, all who are present and actually assist a man to commit a rape, may be indicted as principal offenders, whether they be men or women. 1 *Haw.* 108.

And, so one woman may be a principal to the ravishment of another.

So also may a man be guilty of a rape on his own wife; as was the case of lord Audley, who held his wife while his servant, by his command, ravished her. See *State Trials*, lord Audley's case.


☞ Accessories before the fact are punished as principal offenders. 1 *Rev. Code*, p. 356, sect. 4.

#### (A) Warrant for a rape.

to wit.

Whereas M A, of the said county, hath this day made oath before me, J P, a justice of the peace for the county aforesaid, that on the day of this present month, at in the said county, B O, of &c. did feloniously ravish, and carnally know her the said M A, against her will. These are therefore to command you to take the said B O, and bring him before me, or some other justice of the peace for the county of aforesaid, to answer the said charge, and further to be dealt with according to law. Given under my hand and seal, &c.

To to execute.

 For COMMITMENTS and other proceedings, see title CRIMINALS.

*(B) Indictment for ravishing a woman.*

county, to wit.

The jurors, &c. upon their oath present, that A B, late of the parish of \_\_\_\_\_ in the county of \_\_\_\_\_ gentleman, not having the fear of God before his eyes, but being moved and seduced by the instigation of the devil, on the \_\_\_\_\_ day of \_\_\_\_\_ in the year \_\_\_\_\_ and in the \_\_\_\_\_ year of the commonwealth, with force and arms, at the parish of \_\_\_\_\_ in the county of \_\_\_\_\_ aforesaid, in and upon one A P, spinster, in the peace of God and of the commonwealth then and there being, violently and feloniously did make an assault, and her the said A P, against the will of her the said A P, then and there feloniously did ravish and carnally know, against the form of the statute in such case made and provided, and against the peace and dignity of the commonwealth.

*(C) Indictment for carnally knowing and abusing a female child under the age of ten years.*

county, to wit.

The jurors, &c. upon their oath present, that G D, late of the parish of \_\_\_\_\_ in the county of \_\_\_\_\_ labourer, not having the fear of God before his eyes, but being moved and seduced by the instigation of the devil, on the \_\_\_\_\_ day of \_\_\_\_\_ in the year \_\_\_\_\_ and in the \_\_\_\_\_ year of the commonwealth, with force and arms, at the parish aforesaid, in the the county aforesaid, in and upon one E P, spinster, an infant under the age of ten years, to wit, of the age of nine years and upwards, in the peace of God and of the commonwealth then and there being, feloniously did make an assault, and her the said E P then and there, wickedly, unlawfully, and feloniously, did carnally know and abuse, against the form of the statute in such case made and provided, and against the peace and dignity of the commonwealth.

## RECOGNIZANCE.

A RECOGNIZANCE is a bond of record, testifying the recognizor to owe a certain sum of money to some other; and the acknowledging of the same is to remain of record; and none can take it, only a judge or officer of record. *Dat. c. 186.*

And these recognizances, in some cases, the justices of the peace are enabled to take by the express words of certain statutes: but in other cases (as for the peace, and behaviour, and the like) it is rather in congruity, and by reasonable intendment of law, than by any express authority given them, either by their commission, or by the statute law. *Crom.* 125. *Dalt.* c. 168.

But whosoever any statute giveth them power to take a bond of any man, or to bind over any man to appear at the assizes or sessions, or take sureties for any matter or cause, they may take a recognizance. Yea, whosoever they have authority given them to cause a man to do a thing, there it seemeth they have in congruity power given them to bind the party by recognizance to do it; and if the party shall refuse to be bound, the justice may send him to jail. *Dalt.* c. 168.

But he can take no recognizance but only of such matter as concern his office; and if he doth, it seemeth to be void. *Ibid.*

Every recognizance taken by justices of the peace shall be made payable to the person having the executive power. And all bonds to be entered into by sheriffs or other public officers must be made payable to the justices of the court taking such bond. See *Ordinance of Convention* (interregno) 1776, ch. 5, p. 37, sect. 7, 8, of the edition of the laws in 1785.

It must also contain the name, place of abode, and trade or calling, both of principal and sureties, and the sums in which they are bound. *Barl. Recog.*

And it is most commonly subject to a condition, which is either endorsed or underwritten, or contained within the body of it, upon the performance of which the recognizance shall be void. *Ibid.*

When the parties are to enter into a recognizance, it is usual to call their names thus: You A B acknowledge to owe to governor of this commonwealth, and his successors, the sum of . And you C D acknowledge to owe to governor of the commonwealth, and his successors, the sum of . To be levied of your respective goods and chattels, lands and tenements, for the use of the commonwealth, if default shall be made in the condition following; that is to say, if you the said A B shall make default in appearing, &c. It is said that the parties need not sign it. (*Ibid.*) But the better practice seems to be for the parties to sign it.

It is also said to be usual for the justices to mark at the foot of the examination, A B in dollars to appear, &c. and from such short note to make out a record afterwards. (*Ibid.*) But this is not usual in this state.

The recognizance is a matter of record presently, so soon as it is taken and acknowledged, although it be not made up. *Dalt.* c. 168.

And when it is made up, if the justice shall only subscribe his name, without his seal to it, this is well enough; and that may be in either of these sorts, *acknowledged before me*, J P, or only to subscribe his name thus, J P. *Ibid.* 176.

☞ If the recognizance be forfeited, and an award of execution thereupon, it issues against the '*lands and tenements, goods and chattels.*' See *Rastell's Entries*, 546, a. pl. 5.

The justices should always certify, or transmit their recognizances to the next court; or to the court of examination, if they shall be of

opinion that the offence is triable in the district court, and consequently order a court of examination to be summoned.

The conditions of recognizances, in all the variety of cases, are interspersed under their proper titles.

(A) *Recognizance with sureties.*

county, to wit.

Be it remembered, that on the            day of            in the year  
A O, of            in the county aforesaid, yeoman, and A S,  
of            in the county aforesaid, taylor, and B S, of            in the  
county aforesaid, labourer, personally came before me, J P, a justice  
of the peace for the said county, and acknowledged themselves to owe  
and be indebted to A G, governor or chief magistrate of the common-  
wealth of Virginia, and his successors, that is to say, the said A O  
the sum of            and the said A S and B S each the sum of  
separately, of good and lawful money of this commonwealth, to be  
made and levied of their goods and chattels, lands and tenements, re-  
spectively, to the use of the said commonwealth, if the said A O shall  
make default in the condition hereon endorsed (or hereunder written.)

Acknowledged before me,

J P.

[The condition is according to the subject matter, and in the form  
annexed to precedent (B).]

(B) *Recognizance without sureties.*

county, to wit.

Be it remembered, that on the            day of            in the year  
A O, of            in the said county, yeoman, personally came before me,  
J P, one of the justices of the peace for the said county, and acknow-  
ledged himself to owe to A G, governor, &c. and his successors  
dollars, of lawful money of this commonwealth, to be made and levied  
of his goods and chattels, lands and tenements, to the use of the said  
commonwealth, if the said A O shall fail in the condition under-  
written (or endorsed.)

The condition of the above written (or, *within written*) recognizance  
is such, that if the above bound A O shall, &c. (*here insert the cause  
for the performance of which the party is bound.*) Then the said recog-  
nizance to be void, else to remain in its force.

## RENTS.

THE word rent or render, *reditus*, signifies a compensation or return, it being in the nature of an acknowledgment given for the possession of some corporeal inheritance. It is defined to be a certain profit, issuing out of lands and tenements corporeal. It must be a *profit*; yet there is no occasion for it to be, as it usually is, a sum of money. This profit must also be *certain*; or that which may be reduced to a certainty by either party. It must also issue *yearly*; though there is no occasion for it to issue every successive year. Yet, as it is to be produced out of the profits of lands and tenements, as a recompence for being permitted to hold or enjoy them, it ought to be reserved yearly, because those profits do annually arise and are annually renewed. It must *issue out* of the thing granted, and not be part of the land or thing itself; wherein it differs from an exception in a grant, which is always of part of the thing granted. It must lastly issue out of *lands and tenements* corporeal; that is, from some inheritance whereunto the owner or grantor of the rent may have recourse to distrain. Therefore a rent cannot be reserved out of an advowson, a common, an office, a franchise, or the like. But a grant of such annuity or sum may operate as a personal contract, and oblige the grantor to pay the money reserved, or subject him to an action of debt; though it doth not affect the inheritance, and is no legal rent in contemplation of law. 2 *Bl. Com.* 41.

It is impossible to form a sufficient idea of the doctrine of *rents* as received in this country from England (particularly that class which goes under the denomination of *Rent-service*) without possessing some knowledge of the Feodal Tenures, from which the law and practice of rents are immediately derived. But as it would far exceed the limits proposed in this publication, to enter at large into an historical account of the origin of feuds; I shall only mention so much of that subject as will be necessary to illustrate this title, and refer the curious and learned reader to such authors as have treated of the matter more in detail. See 2 *Bl. Com.* ch. 4, 5. *Wright's Tenures*. *Darvynple on Feodal property*. *Stuart's view of society in Europe*, &c. And an excellent note to *Hargrave's Coke on Littleton*, folio 64. a.

The introduction of the feodal (feudal or military) tenures in England seems to have been intended by William the Conqueror, with whom they first originated, as a mean to protect his newly acquired dominions against the frequent invasions of his northern neighbours. Under this tenure the king was considered the supreme lord of the whole territory of England, by whom the lands were divided among the lesser lords or barons, and by them among the common people

or vassals, upon condition, generally, to render their lord certain services in the wars; on failure of which services the land became forfeited to the lord of the see of whom it was holden. (2 *Bl. Com.* ch. 4, 5.) The evidences of the vassal's title were an open and public delivery of possession by the lord; who in return received the vassal's declaration of *homage* and *fealty*. 2 *Bl. Com.* 53. *Lit.* sect. 85, 91.

The *services* incident to this investiture, were either *military*, as attending the lord in his wars, or *ministerial*, as attending him at his courts, &c. 2 *Bl. Com.* 56. *Gilb. Dist.* 1.

The *qualities* annexed to those feuds do not require any particular notice in this place; it is sufficient to observe, that the feudatories being unable to attend to the cultivation of the soil, from their liability to be called out at any season of the year. by their superior lord, it was found necessary to commit the management of their lands to other inferior vassals, requiring in return a compensation in certain parts of its produce, as in corn, cattle, money, &c. which is the origin of *Rents*.

Under this title, I shall consider,

### *I. The several kinds of rent. II. The remedy by distress.*

And herein,

*I. For what causes a distress may be made, and in what other manner rent may be recovered. II. What goods may be distrained, and what not. III. At what time and place the distress shall be taken. IV. That reasonable distress shall be taken. V. Manner of making a distress. VI. Distress how to be demeaned. VII. Of rescous and pound breach. VIII. Replevying the distress. IX. Sale of the distress. X. Irregularity in the proceedings. XI. Landlord re-entering on non-payment. XII. Attorning to strangers. XIII. Rent in case of an execution. XIV. Rent how far recoverable by executors or administrators. XV. Attachments for rent. XVI. Practical directions as to the making of a distress for rent. XVII. Precedents of replevy bonds, &c.*

### *III. Of the action of replevin.*

#### **I. THE SEVERAL KINDS OF RENT.**

The usual division of rents, by the common law, is, into rent-service, rent-charge, and rent-seck. *Lit.* sect. 213.

*Rent-service* is so called, because it hath some corporal service incident to it, as at the least fealty, or the feudal oath of fidelity. For if a tenant holds his lands by fealty, and ten shillings rent, or by the service of ploughing the lord's land, and five shillings rent; these pecuniary services being connected with personal services, are therefore called rent service. And for these, in case they be behind or arrear, at the day appointed, the lord may distrain of common right, without

reserving any special power of distress; provided he hath in himself the reversion or future estate of the lands and tenements, after the lease or particular estate of the lessee or grantee is expired. (2 *Bl. Com.* 52. *Co. Lit.* 142. *Lit.* sect. 215.) In the same manner it is, if a lease be made to a man for life, or the life of another, rendering to the lessor certain rent, or for term of years rendering rent. (*Lit.* sect. 214.) For these are rent-services, because fealty is incident to these rents. *Co. Lit.* 142. *Lit.* sect. 131, 132.

A *rent-charge* is, where the owner of the rent hath no future interest or reversion expectant in the land; as, where a man by deed maketh over his *whole* estate in fee simple, with a certain rent payable thereout, and adds to the deed a covenant or clause of distress, that if the rent be arrear, or behind, it shall be lawful to distrain for the same. In this case the land is liable to the distress, not of common right, but by virtue of the clause in the deed: and therefore it is called *rent-charge*, because in this manner the land is charged with a distress for the payment of it. 2 *Bl. Com.* 42. *Co. Lit.* 143.

*Rent-seck*, *reditus siccus*, or barren rent, is in effect nothing more than a rent reserved by deed, but without any clause of distress. 2 *Bl. Com.* 42.

## II. THE REMEDY BY DISTRESS.

This is one of those few cases in which the law permits a man to be his own avenger, or to minister redress to himself, viz. to distrain cattle or other goods for non-payment of rent or other duties, or to distrain another's cattle *damage-feasant*, that is doing damage, or trespassing upon his land. The former intended for the benefit of landlords, to prevent tenants from secreting or withdrawing their effects to his prejudice; the latter arising from the necessity of the thing itself, as it might otherwise be impossible at a future time to ascertain whose cattle they were that committed the trespass or damage. 3 *Bl. Com.* 6.

A distress is defined by judge Blackstone to be "the taking of a personal chattel out of the possession of the wrong-doer into the custody of the party injured, to produce a satisfaction for the wrong committed; and the most usual injury for which a distress may be taken is, the non-payment of rent." 3 *Bl. Com.* 6.

It has been already seen, that distress was incident by the common law, to every *rent-service*, and by particular reservation to *rent-charges* also. These distresses were substituted in lieu of the forfeiture of the feud or estate by the old feudal law, on the non-performance of the services stipulated to be done by the tenant; and were, in their origin, nothing more than a pledge in the hands of the lord, by retaining which in his possession (for he could not sell the property taken by distress) he might compel a performance; and the detention was no longer lawful, than while the tenant refused to do the services reserved by the feudal contract. *Gill. Dist.* 2, 4.

But when the military services ceased to be necessary, and the distress was considered merely as a remedy to compel the payment of the money, or other thing reserved, it would have defeated the very object of the distress, to suffer the property to remain in the hands of the



lord, as a pledge, and thereby deprive the party of the means of paying the rent. (4 Burr. 589.) For these reasons, by various statutes in England (the substance of many of which we have adopted in this state) the mode of proceeding *after making the distress*, particularly as to the sale of it, has been pointed out, leaving the *right of distraining* as it stood at the common law. The necessity then of recurring to the origin of distresses by the common law is sufficiently obvious, as without it, the most familiar case would be perfectly unintelligible. See 2 Bl. Com. 42. Litt. sect. 213. Co. Litt. 142. a. Litt. sect. 131, 132. Co. Litt. 142. b.

It was formerly held that a distress would not lie, if the rent was reserved upon any thing except *land*; but it has lately been decided, that a landlord may distrain for the rent of ready furnished lodgings. (2 Bos. & Pull. N. Rep. 224. *Newman v. Anderton*. *Bradb. on Distr.* 26.) So, on a reservation of rent, for a mill and stock, and a slave, if the lessee be evicted of the slave, the rent shall be apportioned. See 3 Hen. & Munf. 470. *Newton v. Wilson*.

I. FOR WHAT CAUSES A DISTRESS MAY BE MADE, AND IN WHAT OTHER MANNER RENT MAY BE RECOVERED.

Distress for rent must be, for rent in arrear, therefore it may not be made on the same day on which the rent becomes due; for if the rent is paid in any part of that day, whilst a man can see to count money, the payment is good.

It must not be after tender of payment; for if the landlord come to distrain the goods of his tenant for rent behind, before the distress the tenant may, upon the land, tender the arrearages, and if after that a distress be taken, it is wrongful; and if the landlord have distrained, if the tenant, before the impounding thereof, tender the arrearages, the landlord ought to deliver the distress, and if he doth not the detainer is unlawful. Even so it is, in case of a distress for damage feasant (or damage done by cattle trespassing) the tender of arrears before the distress maketh the distress unlawful; and after the distress, and before the impounding, the detainer unlawful. 2 Inst. 107. 8 Co. 147.

'Any person or persons having rent in arrear, or due upon any lease or demise for life or lives, may bring an action or actions of debt for such arrears of rent, in the same manner as if such debt were due and reserved upon a lease for years.' 1 Rev. Code, ch. 89. sect. 11, p. 155. See also *Selw. N. P.* 467.

And by sect. 12. The power of distress is given to a person having rent in arrear, upon any lease for *life or lives*, or for *years*, or *at will*, after the determination of the respective leases, (sect. 13) provided, that the distress be made within six months after the determination of the lease, and during the continuance of the landlord's title or interest, and during the possession of the tenant. No distress shall be made after the expiration of five years after the rent became due.

Sect. 14. Not to affect any debts, &c. due to the commonwealth.

By the common law, two distresses cannot be taken for one rent, if there were sufficient goods when the first distress was made, unless

too little was taken by mistake. Otherwise it is, if there was not sufficient. 2 *Lutw.* 1532. *Mo.* 7. *Comb.* 546. *Burrows.* 539.

If distress and sale is made for rent pretended to be in arrear, where in truth no rent is in arrear, the owner of the goods distrained and sold, his executors, &c. shall have remedy by action of trespass, or upon the case, against the person so wrongfully distraining, his executors &c. and shall recover double the value of the goods distrained and sold, and full costs of suit. 1 *Rev. Code*, ch 89, sect. 4, p. 154.

By sect. 22. (page 156.) Where rent accrues on lands, &c. held in right of the wife, during her life, the husband may recover the same after her death, either by action of debt, or by distress.

If the distress be taken of goods without cause, the owner may make *rescous*; but if they be distrained without cause, and impounded, the owner cannot break the pound and take them out, because they are in the custody of law. 1 *Inst.* 47. 3 *Bl. Com.* 12.

☞ In the case of a house being burnt before the expiration of the tenant's interest, it has generally been held, that the tenant was bound to pay the rent, annually, during the time for which he was to hold it, notwithstanding he covenanted to repair, *accidents by fire excepted*. And to this point are the cases of *Paradine v. Jane*, *Allen* 27; and *Monk & Cooper*. 2 *Str.* 763. But in the case of *Brown v. Quilter* (*Ambler*, 619) it was held on a case exactly similar, that it was good ground for relief, by injunction in chancery; and the chancellor expressed his surprise that a defence was not allowed at law to such action. (See *Francis's Maxims* (*Hening's edit*) Maxim VII. pl. (2) *where all the late decisions on this point are collected*.)

## II. WHAT GOODS MAY BE DISTRAINED, AND WHAT NOT.

Distress for rent must be of such things whereof a valuable property is in some body, and therefore dogs, bucks, does, conies, and the like, that are *feræ naturæ*, cannot be distrained. 1 *Inst.* 47.

Although it be of valuable property, as a horse, yet when a man or woman is riding upon him, or an axe in a man's hand cutting of wood, and the like, they are for that time privileged, and cannot be distrained. 1 *Inst.* 47.

But it is said, that if one be riding upon a horse *damage feasant*, the horse may be led to the pound with the rider upon him. 1 *Sid.* 440, 442.

And it hath been held, that horses joined to a cart, with a man upon it, cannot be distrained for rent (although they may for *damage feasant*) but both cart and horses may, if the man be not upon the cart. 1 *Vent.* 36.

Valuable things shall not be distrained for rent, for benefit and maintenance of trades, which by consequence are for the commonwealth, and are there by authority of law; as a horse in a smith's shop shall not be distrained for the rent issuing out of the shop, nor an horse in an hostry, nor the materials in a weaver's shop for making of cloth, nor cloth nor garments in a tailor's shop, nor sacks of corn or meal in a mill, nor any thing distrained for *damage feasant*, for it is in custody of the law; and the like. 1 *Inst.* 47.

But it seems that a chariot in a common livery stable is distrainable,

because the owner of the stable is not bound to receive it, as in the case of an inn-keeper, &c. See *Burrow*. 1498. *Bl. Rep.* 483. *Francis v. Wyatt*.

Beasts belonging to the plough shall not be distrained (which is the ancient common law of *England*, for no man shall be distrained by the utensils or instruments of his trade or profession, as the axe of the carpenter, or the book of the scholar) while goods or other beasts may be distrained. 1 *Inst.* 47.

But this rule holds only in distresses for rent arrear, amercements and the like; but doth not extend to cases where a distress is given, in the nature of an execution, by any particular statute, as for poor rates and the like. 3 *Salk.* 136.

So beasts of the plough and cart may be distrained for the poor rate. See *Bur.* 579. *Hutchins v. Chambers*.

Furnaces, cauldrons, or other things fixed to the freehold, or the doors or windows of a house, or the like, cannot be distrained. 1 *Inst.* 47.

Things for which a replevin will not lie, so as to be known again, as money out of a bag, cannot be distrained. 2 *Bac. Abr.* 109.

But money in a bag sealed may be distrained; for that the bag sealed may be known again.

Generally, whatever goods and chattels the landlord finds upon the premises, whether they in fact belong to the tenant or a stranger, are distrainable by him for rent; for otherwise a door would be opened to infinite frauds upon the landlord; and the stranger hath his remedy over by action on the case against the tenant, if by the tenant's default the goods are distrained, so that he cannot render them when called upon. 3 *Bl.* 8.

But on particular circumstances perhaps a court of equity may relieve. As in the case of *Fowkes and Joyce*, in the common pleas, a person driving sheep to London to sell, by agreement with the master of an inn, put them into the field at so much a score for the night. The landlord seeing them, asked whose they were, but consented to their staying there, and afterwards distrained them for rent due to him from the master of the inn, and it was adjudged for the landlord. 3 *Lev.* 260. 2 *Ventr.* 50.

But in the same case, upon a bill for relief in equity, the lords commissioners seemed to think, that the grounds lying to the inn, and used therewith, ought to have the same privilege as the inn hath, and that passengers' cattle ought not to be distrainable there. (2 *Vern.* 129.) And it appeared in this case, that on the landlord's coming and seeing the sheep, he pretended to be angry. Upon which the owner offered to take out the sheep, at which time they were not distrainable for the rent, having not been *levant and couchant* (that is, not having so long remained upon the ground, as to have laid down and risen up again to feed) so that the court looked upon the consent as a fraud, to get them to be left all night, by which they became liable to the distress. And it was decreed, that the landlord should answer for the value of the sheep, and pay costs both in law and equity. *Prec. Chan.* 7.

Where a stranger's beasts escape into the land, they may be distrained for rent, though they have not been *levant and couchant*, provided they are trespassers; but if the tenant of the land is in default, in not repairing his fences, whereby the beasts came into the land,

the landlord cannot distrain such beasts, though they have been levant and couchant, unless he has caused notice to be given to the owner, and the owner suffers them to remain there afterwards. *Lutw.* 364.

In case of rent reserved upon a lease for years, the landlord cannot distrain cattle escaping into his lands until they be levant and couchant; for if the landlord had had the lands in his own hands, he ought to have repaired the fences; and when he puts in a lessee, he ought by covenant oblige him to repair: and therefore in that case, if the law would allow the landlord to distrain the cattle of a stranger which came in by escape, before that they be levant and couchant, it would be in effect to allow a man to take advantage of his own wrong. Therefore, if the cattle come in by default of the owner of the cattle, then they may be distrained before they be levant and couchant; and if in default of the tenant of the land, there they cannot be distrained until they have been levant and couchant, that is to say, for rent upon leases for years. And in such case the landlord shall not take the cattle before that he has given notice to the owner, that they are upon the land liable to his distress; and if he doth not come to take them away, then they become distrainable. And by Treby, chief justice; where the cattle escape accidentally, there they are not distrainable, until they have been levant and couchant; but if they escape by default of their owner, they are distrainable the first minute. *L. Raym.* 168, 169.

In the case of Broden and Pierce, where a rent charge was in arrear for twenty years, and cattle escaped out of the next ground, and were distrained; lord Nottingham (in equity) relieved against it. *2 Vern.* 231.

If ten head of cattle were doing damage, a man cannot take one of them and keep it till he be satisfied for the whole damage; but he may bring an action of trespass for the rest. *12 Mod.* 660.

If a man come to distrain damage feasant, and see the beasts in his ground, and the owner chase them out, of purpose, before the distress taken; yet the owner of the soil cannot distrain them, and if he doth, the owner of the cattle may rescue them; for the beasts must be damage feasant at the time of the distress. *1 Inst.* 161.

For distress, damage feasant is the strictest distress that is; and the things distrained must be taken in the very act; for if the goods are once off, though on fresh pursuit, the owner of the ground cannot take them. *12 Mod.* 661.

### III. AT WHAT TIME AND PLACE THE DISTRESS SHALL BE TAKEN.

For a rent service the landlord cannot distrain in the night, but in the day time; and so it is of a rent charge; but for damage feasant, one may distrain in the night; otherwise, it may be, the beasts may be gone before he can take them. *1 Inst.* 142.

For before sun rising, or after sun set, no man may distrain but for damage feasant. *Mirror. c. 2, sect. 26.*

By the common law, if the lessor did not find sufficient distress on the premises, he could resort no where else, and therefore tenants, who were knavish, made a practice to convey away their goods and stock fraudulently from the house or lands demised, in order to cheat their landlords. *3 Bl. Com.* 11.

But by *Virginia Laws* (1 *Rev. Code*, ch. 89, sect. 9, p. 154.) where goods and chattels are fraudulently or clandestinely carried off from the premises, on which rent is in arrear, the landlord may distrain them, within ten days, in the same manner as if they had remained on the land.

Sect. 10. *Provided*, that goods so carried off, and *bona fide* sold for a valuable consideration, shall not be liable to be seized.

#### IV. THAT REASONABLE DISTRESS SHALL BE TAKEN.

"Distresses shall be reasonable, and not too great, and he that taketh great and unreasonable distresses shall be amerced for the excess of such distresses." 1 *Rev. Code*, ch. 89, sect. 24, p. 156.

For example, if the lord distrain two or three oxen for twelve pence, or the like small sum, and the owner bring a replevy of the oxen, and the lord avow the taking of them for the twelve pence of his own shewing, he shall make fine; or the party may have his action upon this statute. 2 *Inst.* 207.

If the lord distrain an ox, or horse, for a penny; if there were no other distress upon the land holden, the distress is not excessive: but if there were a sheep, or a swine, or the like, then the taking of the ox or horse is excessive, because he might have taken a beast of less value. 2 *Inst.* 107.

#### V. MANNER OF MAKING A DISTRESS.

Gates or inclosures may not be broken open, nor thrown down, to make a distress. 1 *Inst.* 161.

Nor may the lessor enter into the tenant's house, unless the doors are open. 2 *Bac. Abr.* 111.

Upon a question about taking a distress, it was held by the lord chief justice Hardwick, that a padlock put on a barn door could not be opened by force, to take the corn by way of distress. 9 *Viner* 128.

But if the outer door of an house is open, one may break an inner door to take a distress. *Ca. Temp. Hardw.* 168.

If a landlord comes into a house, and seizes upon some goods for a distress, in the name of all the goods of the house; that will be a good seizure of all. 6 *Mod.* 215.

#### VI. DISTRESS HOW TO BE Demeaned.

By *Virginia Laws* (p. 164, sect. 24.) "it shall not be lawful for any person taking any distress, to drive or remove the same out of the county where such distress was taken. And whosoever doth so, shall be amerced at the discretion of a jury." 1 *Rev. Code*, ch. 189, sect. 24, p. 156.

Cattle distrained may not be worked or used, unless for the owner's benefit, as a cow milked, or the like; much less may they be abused or hurt. *Crp. Jac.* 148.

If the distress be lost by the act of God; as, if the distress dies in the pound, without any default in the distrainer, in such case he who made the distress may distrain again. 1 *Salk.* 248.

## VII. OF RESCOUS AND POUND BREACH.

Pound breach, by the common law, is a great offence, for which the party is to be pursued by hue and cry. (*Mir. c. 2*, sect. 26.) And the distrainer may take the goods again. 1 *Inst.* 47.

And by the laws of Virginia, "upon any pound breach or rescous, the party injured shall recover treble damages." 1 *Rev. Code*, ch. 89, sect. 5, p. 154.

When a man hath taken distress, and the cattle distrained, as he is driving them to the pound, go into the house of the owner; if he that took the distress demand them of the owner, and he deliver them not, this is rescous in law. 1 *Inst.* 161.

If the tenant tender the rent to the lord when he is to take the distress, if notwithstanding, the lord will distrain, the tenant may make rescous. And if the lord will distrain *beasts of the plough*, where there is sufficient distress to be taken besides, or if the lord distrain any thing that is not distrainable, either by the common law or by any statute, the tenant may make rescous. (*Co. Lit.* 161. a.) The same law, if no rent is due. *Ibid.* 47. b.

## VIII. REPLEVING THE DISTRESS.

The replevy, of which we shall here speak, is an indulgence granted by the laws of this commonwealth to the tenant, who is thereby permitted, at any time within ten days after the distress made, to enter into bond, with sufficient security, for the payment of the money or tobacco, with interest and costs, at the end of three months. And we must also observe, that this kind of replevy is materially different from that regulated by the statute of 1 & 2 *P. & M.* and so often spoken of by the writers on the laws of England; that being a mere security to try the right of the distress, and to restore the property to the distrainer, if the right be determined against the tenant (3 *Bl. Com.* 13.) but *this* being an indulgence to the tenant, in extending the time of the payment of his rent three months, without destroying his remedy by action of replevin to determine on the *right* of the distress, if he thinks proper to pursue it.

Having said thus much of the *replevy*, as regulated by our laws, it will be sufficient to refer to the act itself, in which the true distinction between a *replevy* for three months, and the *action of replevin* will be discovered, and where the proceedings on a distress for rent are also pointed out. See *Virginia Laws* (1 *Rev. Code*, ch. 89, p. 153, sect. 1, 2, 3.) as to *replevying* for three months; and sections 15, 16, 17, 18, p. 155, as to the action of *replevin*.

## IX. SALE OF THE DISTRESS.

The power of selling the distress has already been seen under the preceding division of this title. A difficulty, however, occurs under the present laws, with respect to the conduct of the officers making the distress, where the tenant does not replevy for three months, or sue out a writ of replevin, and the officer is to proceed to sell the goods

on three months credit. The act 1748 (ch. 10, sect. 1.) directed the goods to be sold *in the like manner as goods or chattels taken in execution*. These words are omitted in the act in the revised code (p. 153.) and the distress for rent has always been excepted out of the new execution laws. (See 1 *Rev. Code*, ch. 151, sect. 30, p. 302.) The question then is, how is the officer to advertise the property? Under the act of 1748, no difficulty arose, because by a reference to the execution law, the mode was there pointed out.

#### X. IRREGULARITY IN THE PROCEEDINGS.

By the common law, if a distress was made for rent in arrear, and any irregularity was committed, the whole proceedings were void, and the distrainer a trespasser *ab initio*. To remedy this, the act of 11 *Geo.* 2, c. 19. was passed. But as that statute is not in force here, and no provision is made by our laws, *quare*, if it does not remain as at common law. See 3 *Bl. Com.* 14.

#### XI. LANDLORD RE-ENTERING ON NON-PAYMENT:

By *Virginia Laws* (1 *Rev. Code*, ch. 89, sect. 19, p. 155.) grantees, or assignees of lands, &c. shall have the same advantages against the lessees, by entry, for non-payment of the rent, or for waste, or other forfeiture, &c. as the lessors themselves.

By sect. 20. Lessees shall have the same benefit of contract against the grantee of the land, &c. as they could have had against the grantor.

#### XII. ATTORNING TO STRANGERS.

By *Virginia Laws* (1 *Rev. Code*, ch. 90, sect. 18, p. 159.) "the attornment of a tenant to any stranger shall be void, unless it be with consent of the landlord of such tenant, or pursuant to, or in consequence of, the judgment of a court of law, or the order or decree of a court of equity."

And by sect. 17. "Grants of rents, or of reversions or remainders, shall be good and effectual without the attornments of the tenants, but no tenant, who, before notice of the grant, shall have paid the rent to the grantor, shall suffer any damage thereby."

#### XIII. RENT IN CASE OF AN EXECUTION.

By *Virginia Laws* (1 *Rev. Code*, ch. 89, sect. 6, p. 154.) upon an execution against the tenant, no goods or chattels shall be removed till the plaintiff pays or tenders to the landlord the whole rent due. (Sect. 7.) Provided that it shall not extend to more than one year's rent. See also, 1 *Rev. Code*, ch. 151, sect. 54, p. 306.

And the landlord must demand the year's rent, or the sheriff will not be bound to secure it for him. 1 *Strange* 97.

And in case of two executions, there shall not be two years rent paid to the landlord; for the intent of the act was to reserve to the landlord only the rent for one year, it is his own fault if he let more run in arrear. Therefore one year's rent to the landlord being paid to him on

the first execution, the sheriff is not to levy for him again any thing on a subsequent execution. *Str.* 1024.

XIV. RENT HOW FAR RECOVERABLE BY EXECUTORS OR ADMINISTRATORS.

By *Virginia Laws* (1 *Rev. Code*, p. 156, sect. 21, 23.) the same remedy is given to executors or administrators for the recovery of rent due to the testator, or intestate, as he himself might have had.

XV. ATTACHMENTS FOR RENT.

These attachments are founded on *Virginia Laws* (1 *Rev. Code*, ch. 89, sect. 8, p. 154.) they are grantable by a justice of the peace, on a well grounded apprehension of the landlord's, supported by oath, that the tenant will remove out of the county or corporation before the expiration of his term, so as no distress can be made for the same.

Attachments for rent may be levied by a constable. 2 *Rev. Code*, ch. 8, sect. 2, p. 5.

*Oath to be administered to the landlord.*

You shall swear, that A T agreed to pay you the sum of \_\_\_\_\_ for the tenement (*describe the kind*) he now occupies; that \_\_\_\_\_ will be due for the same, on the \_\_\_\_\_ day of \_\_\_\_\_ next; and that you have sufficient grounds to suspect, that the said A T will remove his \_\_\_\_\_ out of this county (or corporation) before the expiration of his \_\_\_\_\_ term. So help you God.

*Warrant of attachment.*

To the sheriff of the county of \_\_\_\_\_  
county, to wit.

Whereas E D hath this day made oath before me, J P, a justice of the peace for the county aforesaid, that A B, his tenant, hath agreed to pay him for the rent of a plantation (or house, as the case may be) which the said A B now occupies, the sum of \_\_\_\_\_ on the \_\_\_\_\_ day of \_\_\_\_\_ next, of which he has received no part, and that the deponent hath sufficient grounds to suspect, and verily believes, the said A B will remove his effects out of the county before the said rent will become due: therefore, in the name of the commonwealth, I require you to attach so much of the estate of the said A B, as will be sufficient to satisfy the said C D the rent aforesaid and costs; and if thereupon the said A B shall not enter into recognizance, with one or more sufficient securities, for the payment of the said rent, on the said \_\_\_\_\_ day of \_\_\_\_\_ next, and the costs, then that you secure the estate so attached in your hands, or so provide that the same may be liable to further proceedings herein, at the next court to be held for this county, when you are to make return of this warrant, with an account what you shall have done thereupon. Given, &c.

Bond in the usual form, payable to the sheriff, or his assigns, with this condition:



The condition of the above obligation is such, that whereas the said E F, sheriff (*or constable, as the case may be*) hath this day attached sundry goods and chattels of the said A B, upon an attachment issued from G H, a justice of the peace of the said county, to secure the payment of                      which will be due to C D, for rent, on the                      day of                      next, now if the said A B shall well and truly pay to the said E F, or his assigns, the sum of                      and all costs, on the said                      day of                      next, then, &c.

This bond is to be assigned by the sheriff, or constable, to the landlord, and annexed to the attachment, on which should be this return.

By virtue of this warrant, I did attach sundry goods of the within named A B, which I restored to him on his and his security's executing the annexed bond, by me assigned to the within named C D, according to law.

XVI. PRACTICAL DIRECTIONS AS TO THE MAKING OF A DISTRESS  
FOR RENT.

See (*Hunt's*) *Gilb. Distr.* 330.

It is said that the landlord himself may make the distress, or authorise any person to do it. (See *Gilb. Distr.*) But it seems most proper, if not the only legal mode, in this state, to employ the sheriff or constable, the words "*sheriff or officer*," being the terms used by our laws. See 1 *Rev. Code*, ch. 89, sect. 1, p. 153.

*Warrant of Distress.*

To Mr. A B. 'Distrain the goods and chattels of C D (the tenant) in the house he now dwells in (*or, on the premises in his possession*) situate in                      in the county of                      for                      pounds, being                      years rent (*or, as the case is*) due to me for the same, at the                      day of                      last past (*or any other*) and for your so doing, this shall be your sufficient warrant and authority. Dated the                      day of                      in the year                      W T.

☞ If the goods be removed from the premises, the landlord may distrain them, within ten days thereafter: in that case the authority to distrain must vary in its expression to suit the case.

Being legally authorised to distrain, you enter on the premises, and make a seizure of the distress. If the distress be made in a house, you seize a chair or other piece of furniture, and say, I sieze this chair (*or whatever it be*) in the name of all the goods in this house, for the sum of                      being                      years rent (*or, as the case is*) due to me (*or to W T, your landlord*) on the                      day of                      last past (*or any other*) (*and if the distress be made by any other than the landlord, you add*) by virtue of an authority from the said W T, for that purpose.

You then proceed to take an inventory of so many goods, as you judge will be sufficient to cover the rent distrained for, and also the charges of the distress. Having done this, you make a copy of the inventory, according to the following form.

An inventory of the several goods and chattels distrained by me, A B (the distrainer) the      day of      in the year of our Lord      in the houses, out houses, and lands (according to the case) of C D (the tenant) situate in      of the county of      (and if the distress be made by any other than the landlord, say) (by the authority and on the behalf of W T, your landlord) for the sum of      pounds, being      years rent (or, as the case is) due to me (or to the said W T) on the      day of      last past. In the dwelling house, one table, six chairs, &c. In the cow house, six cows, two calves, &c.

*At the bottom of the inventory you subscribe the following notice to the tenant.*

Mr. C D. Take notice, that I have this day distrained on the premises above mentioned, the several goods and chattels specified in the above inventory, for the sum of      pounds, being      years rent (or, as the case is) due to me (or, to the said W T) on the      day of      last past (or, any other) for the said premises; and that unless you pay the said rent, with the charges of distraining for the same, within ten days from the date hereof, the said goods and chattels will be sold according to law. Given under my hand, the      day of      in the year of our Lord

A B, sheriff (or constable,)

A true copy of the above inventory and notice must either be given to the tenant himself or left at his house; or, if there be no house, on the most notorious place on the premises. And it is proper to have a person with you when you make the distress, and also when you serve the inventory and notice, to examine the inventory, and to attest, if there be occasion, the regularity of the proceedings.

The safest way is to remove the goods immediately, and in your notice to acquaint the tenant where they are removed: but it is now most usual to let them remain on the premises, leaving a man in possession till you are intitled by law to sell them.

☞ If the sheriff is in possession of the goods of a tenant, by virtue of an execution, the landlord need not make a distress, but should forthwith serve him with the following

### *Notice.*

To E S, sheriff of the county of

Take notice, that there is now due to me, from T H, the person to whom the goods belong, of which you are now in possession, by virtue of the commonwealth's writ of *fiery facias*, &c. returnable (here mention the return) the sum of      for one year's rent due on the      day of      last past. Witness my hand, this      day of      in the year

W H, landlord of the premises.


See *Gibb. Distr.* (by Hunt) 334, 335.

## XVII. PRECEDENTS OF REPLEVY BONDS, &amp;c.

*Replevy bond to pay the rent at the end of three months,  
on sect. 1. of 1 Rev. Code, p. 153.*

Know all men by these presents, that we C D, of &c. and D S, of &c. are held and firmly bound unto A B (*the landlord*) in the full and just sum of (*double the rent*) current money of Virginia: to be paid to the said A B, his certain attorney, his executors, administrators or assigns; for the true payment whereof we bind ourselves, our heirs, executors, and administrators, firmly by these presents; sealed with our seals; dated this            day of            in the year

The condition of the above obligation is such, that whereas divers goods of the said A B (*here express the kind*) have been distrained by E F, sheriff (*or constable*) to satisfy the sum of            due to C D, for arrears of rent, the costs of which distress amount to            which said goods have been restored to the said A B, on his entering into bond, with sufficient security, to pay the said rent and costs of distress, amounting to            at the end of three months, now if the said A B, his executors, or administrators, shall, at the end of three months next following the date hereof, pay to the said C D, his executors, administrators, or assigns, the sum of            (*the amount of the rent and costs*) with lawful interest thereon, then the above obligation to be void, or else to remain in full force.

 The officer's commission (which is the same as upon a forthcoming bond) may be included in the above bond. See 1 Rev. Code, ch. 270, p. 405.

*If sold upon three months credit.*

The bond and condition to be the same as for goods sold by execution; only, in the recital, say, the goods were seized for rent.

## III. OF THE ACTION OF REPLEVIN.

An action of replevin, the regular way of contesting the validity of the transaction, is founded upon a distress taken wrongfully and without sufficient cause: being a re-delivery of the pledge, or thing taken in distress, to the owner, upon his giving security to try the right of distress, and to restore it, if the right be adjudged against him. 3 Bl. Com. 147.

It is impossible, on the limited plan of the present publication, to go fully into the law and practice of replevins; I must therefore refer to a very valuable treatise on that subject, written by lord chief baron Gilbert; and conclude this title by a reference to the act of assembly for regulating the suing out writs of replevin; with the addition of some special pleadings.

*Pleadings in replevin.*

## DECLARATION.

county, to wit.

B D was summoned to answer A P, of a plea, why he took the goods and chattels of him the said A P, and unjustly detained them, against surety and pledges, until, &c. And whereupon the same A P, by C A, his attorney, complains, that the said B D, on the       day of       in the year       and in the       year of the commonwealth, at the county aforesaid, in a certain place there called       (*describe the place*) took the goods and chattels following, to wit (*describe the goods very particularly*) of the said A P, and unjustly detained them, against surety and pledges, until, &c. whereby the same A P says, that he is prejudiced and hath damage to the value of       . And therefore he brings suit, &c.

*Avowry for rent in arrear.*

B D  
at the suit of } In replevin.  
A P

And the said B D, by F A, his attorney, comes and defends the force and injury, when &c. and well avows the taking the goods and chattels aforesaid, in the said place where, &c. and justly, &c. because he says, that the same place where the taking of the goods and chattels aforesaid is supposed to be, did contain in itself a certain piece or parcel of land, with the appurtenances, in a place called       in the county aforesaid; of which said piece or parcel of land, with the appurtenances, the said B D, before the said time when, &c. was seized in his demesne as of fee, and being so thereof seized, the said B D, before the said time when, &c. to wit, on the       day of       in the year       and in the       year of the commonwealth, at the county aforesaid, demised the same piece or parcel of land, with the appurtenances, to the said A P, to hold to the same A P, and his assigns, from the       day of       then last past, before the date of the same demise, for the term of       years, from thence next ensuing, and fully to be complete and ended, yielding and paying therefor yearly, and every year, to the said B D, or his assigns, the rent of       of lawful money: by virtue of which said demise, the said A P entered and was possessed of the same piece or parcel of land, with the appurtenances, and the same piece or parcel of land, with the appurtenances, for       year occupied; and because the sum of       of the rent aforesaid, after the demise so made, for the said       : year, on the       day of       last past, and before the taking of the goods and chattels aforesaid, were to the same B D in arrear and unpaid, the same B D well avows the taking of the goods and chattels aforesaid, in the said place where, &c. and justly, &c. for the said sum of       to the same B D, in form aforesaid, being in arrear, as in the piece or parcel of land, with the appurtenances aforesaid, charged and bound; and this he is ready to verify;

wherefore he prays judgment, and a return of the goods and chattels aforesaid, to be adjudged to him.

*Replication that the rent was not in arrear.*

A P	}	In replevin.
v.		
B D.		

And the said A P says, that the said B D, for the reasons before alledged, ought not to avow the taking of the goods and chattels aforesaid, in the said place where, &c. just, because he says, that the said sum of                      of the rent aforesaid, at the said time when, &c. were not in arrear and unpaid to the said B D, nor was any part thereof, at the said time when, &c. in arrear to the said B D, as the said B D, in his avowry aforesaid, hath above alledged; and this he prays may be inquired of by the country : and the said B D likewise, &c.

Where the action of replevin is against the bailiff or person taking the distress, instead of an avowry, he makes conusance as bailiff, &c. The forms of the pleadings differ but little from the above, and may be found in almost every practical book.

## RESCUE.

RESCOUS is an ancient French word, coming from *rescouter*, that is, *recuperare*, to recover; and signifies a forcible setting at liberty, against law, a person arrested by the process or course of law. 1 *Inst.* 160.

If the party rescued be arrested for felony, and in the custody of a private person, the rescuer must have notice of the arrest: otherwise, if in custody of an officer. 2 *H. H.* 606.

It is not felony to rescue a person taken on a general warrant. (1 *H. H.* 578.) Nor unless a felony hath been actually committed. *Hale's Pl.* 116.

Although a prison breaker may be arraigned for that offence, before he be arraigned of the crime for which he was imprisoned; yet he who rescues one imprisoned for felony cannot, according to the better opinion, be arraigned for such offence, as for a felony, till the principal offender be attainted; but he may be immediately proceeded against for a misprision. 2 *Haw.* 140.

And therefore, if the principal die before the attainder, he shall be fined and imprisoned. *Hale's Pl.* 116.

Also, if the principal be found not guilty, or guilty of a crime not capital, the rescuer ought to be discharged of felony; but he may be fined for the misdemeanor. 1 *H. H.* 598, 599.

An indictment of rescous must set forth the nature and cause of the imprisonment, and the special circumstances of the fact in question. 2 *Haw.* 240.

A hindrance of a person to be arrested, that has committed felony, is a misdemeanor, but no felony; but if the party be arrested, and then rescued, if the arrest was for felony, the rescuer is a felon; if for trespass, fineable. *Hale's Pl.* 116. 2 *Haw.* 140.

Although the felony for which a man is arrested be not within clergy, yet the rescuing him is within clergy. 1 *H. H.* 599, 607.

Process of outlawry lies on all returns of rescous. *Haw. B.* 2, c. 27, sect. 113.

### *Indictment for a rescue.*

The jurors for, &c. upon their oath present, that on the day of in the year and in the year of the commonwealth, J P, one of the justices of the peace for the said county of did make, direct, and deliver a warrant or precept, in writing, to A C, of in the said county, constable of in the county aforesaid; by which said warrant, he the said A C, the constable aforesaid, was commanded to take the body of A O, late of yeoman, and bring and have him the said A O before the said J P (or some other justice of the peace for the county of aforesaid, if the warrant was so) to be examined by the said justice concerning (state the offence according to the fact) which said A C, the constable aforesaid, afterwards, to wit, on the day of in the year at in the county aforesaid, by virtue of the said warrant, did take and arrest him the said A O, for the cause aforesaid, and him the said A O, in his custody, by virtue of the said warrant, then and there had; and that the said A O, late of aforesaid, in the county aforesaid, yeoman, and B O, late of the same county aforesaid, yeoman, well knowing the said A O so to be arrested as aforesaid, afterwards, to wit, on the said day of in the year aforesaid, at aforesaid, in the county aforesaid, with force and arms, in and upon the said A C, the constable aforesaid, then and there being in the peace of God and of the commonwealth, and in the execution of his said office then and there being, did make an assault, and him the said A C then and there did beat, wound, and ill treat, and that the said B O him the said A O out of the custody of the said A C, and against the will of the said A C, then and there, with force and arms, unlawfully did rescue, and put at large, to go where he would; and that the said A O himself, out of the custody of the said A C, and against the will of the said A C, then and there, with force and arms, unlawfully did rescue, and escape at large, where he would go; in contempt of the laws of the commonwealth, to the great damage of the said A C, to the evil example of all others in the like case offending, and against the peace and dignity of the commonwealth.

## RESTITUTION OF STOLEN GOODS.

"IF any felon or felons do rob or take any money, goods, or chattels, from any person within this commonwealth, whether from their person or otherwise, and thereof the said felon or felons be afterwards convicted or attainted, then the party so robbed shall be restored to his said money, goods, or chattels; and the court before whom such felon shall be convicted or attainted shall have power to award, from time to time, writs of restitution accordingly." 1 *Rev. Code*, ch. 75, p. 107.

On a similar law in England (*stat. 21 Hen. 8. c. 11.*) the following determinations have been made.

If the owner prefers a bill of indictment, which is found, and the felon flies, and is outlawed, the owner shall have restitution; for he gave evidence upon the indictment, which, though it be not a conviction, is the ground of the outlawry, which is an attainder. 1 *Hale* 545.

So, if the offender is convicted on the evidence of the servant, the master shall have restitution. *Ibid.*

If the testator is robbed, and the thief is convict upon the procurement of the executor, such executor shall have restitution. 3 *Inst.* 242.

A man stole cattle, and sold them in open market; the sheriff seized the thief and the money, and he was convicted and hanged at the prosecution of the owner of the cattle, and he had restitution of the money; for though the statute gives power to the justices to award restitution of the money or goods stolen, and though the money in this case was not stolen, yet because it did arise by stealing, it shall be within the equity, though not in the very words of the statute. (*Noy*, 128. See *Loff's Rep.* 88.) where it was held, that the proceeds of a bank note stolen might be recovered by the party robbed, in an action of *trover*. See also, 1 *Hale* 542, 3, 4. 2 *Haw.* 170. *Kely.* 48. *Cro. Eliz.* 661. 2 *East's Cr. L.* 787.

If the offender be convict upon the evidence of the party robbed, or owner, he shall have restitution, though there were no fresh suit, or any inquiry by inquest touching the same; and this is the constant practice 1 *H. H.* 545.

Yet, if it shall appear to the court that the party hath been guilty of gross neglect in prosecuting; it seemeth that in such case he shall not be intitled to restitution. 2 *Haw.* 171.

If the owner takes his goods again of the offender, to the intent to favour him, or maintain him, this is unlawful, and punishable by fine

and imprisonment; but if he take them again without any such intent, it is no offence. 1 *Hale* 546.

But after the felon is convicted, it can be no colour of crime to take his goods again, where he finds them. *Ibid.*

☞ See PENITENTIARY.

## RIOT, ROUT, AND UNLAWFUL ASSEMBLY.

*I. What is a riot, rout, or unlawful assembly. II. How restrained by a private person. III. How by a constable, or other peace officer. IV. How by the act of assembly.*

### I. WHAT IS A RIOT, ROUT, OR UNLAWFUL ASSEMBLY.

WHEN *three persons*, or more, shall assemble themselves together, with an intent mutually to assist one another, against any who shall oppose them, in the execution of some enterprize of a private nature, with force or violence, against the peace, or to the manifest terror of the people, whether the act intended were of itself lawful or unlawful; if they only meet to such a purpose or intent, although they shall after depart of their own accord, without doing any thing, this is an *unlawful assembly*.

If, after their first meeting, they shall move forward towards the execution of any such act, whether they put their intended purpose in execution or not; this, according to the general opinion, is a *rout*.

And if they execute such a thing in deed, then it is a *riot*. *Dalt. c. 136. Haw. B. 1, c. 65, p. 155. 4 Bl. Com. 146.*

If the jury acquit all but two, and find them guilty, the verdict is void, unless they be indicted *together with other rioters unknown*, because it finds them guilty of an offence, whereof it is impossible they can be guilty; for there can be no riot where there are no more persons than two. 2 *Haw. 441.*

But if there are several defendants, and two are found guilty, and the others die untried, it shall be intended a riot. *Burr. 1262.*

Infants under the age of discretion are not punishable as rioters. 1 *Haw. 159.*

If a number of persons, being met together at a fair, or market, or on any other lawful and innocent occasion, happen on a sudden quar-



rel to fall together by the ears, they are not guilty of a riot, but of a sudden affray only, of which none are guilty but those who actually engage in it; because the design of their meeting was innocent and lawful, and the subsequent breach of the peace happened unexpectedly, without any previous intention concerning it. Yet it is said, that if persons innocently assembled together, do afterwards, upon a dispute happening to arise among them, form themselves into parties, with promises of mutual assistance, and then make an affray, they are guilty of a riot; because, upon their confederating together, with an intention to break the peace, they may as properly be said to be assembled together for that purpose from the time of such confederacy, as if their first coming together had been on such a design. 1 *Haw.* 156.

In every riot there must be some such circumstances, either of actual force or violence, or at least of an apparent tendency thereto, as are naturally apt to strike a terror into the people; as the shew of armour, threatening speeches, or turbulent gestures; for every such offence must be laid to be done *to the terror of the people*. And from hence it clearly follows, that assemblies at wakes, or other festival times, or meetings for exercise, or common sports or diversions, as bull baiting, wrestling, and such like, are not riotous. *Ibid.* 157.

It is not material whether the thing intended to be done be lawful or unlawful in itself. Thus, if in removing a nuisance, entering into land, &c. to which one of the party have a right of entry, any violence or tumult is offered, it is a riot. *Ibid.* 158.

## II. HOW RESTRAINED BY A PRIVATE PERSON.

By the common law, any private person may lawfully endeavour to suppress a riot, by staying those whom he shall see engaged therein from executing their purpose, and also by stopping others whom he shall see coming to join them. 1 *Haw.* 159.

## III. HOW BY A CONSTABLE OR OTHER PEACE OFFICER.

By the common law, the sheriff, constable, and other peace officers, may, and ought to do all that in them lies, towards the suppressing of a riot, and may command all other persons to assist therein. 1 *Haw.* 159.

## IV. HOW BY THE ACT OF ASSEMBLY.

In order to suppress a riot, rout, &c. power is given to three, or two justices of the peace, at least, and the sheriff or under-sheriff of the county, by *Virginia Laws* (1 *Rev. Code*, ch. 28, p. 35, sect. 1.) which see.

It is said that this power may be exercised by the justices, upon credible information, as well as upon their own view; and that if they meet persons, coming from the place where they have heard a riot was committed, arrayed in a riotous manner, they may arrest them. See 1 *Haw.* 161.

## 498 RIOT, ROUT, AND UNLAWFUL ASSEMBLY.

By *Virginia Laws* (1 *Rev. Code*, ch. 27, sec. 2, p. 35.) power is given to the justices, within one month after the riot, &c. to summon twenty-four fit persons, twelve of which shall constitute a jury, to inquire of the said riot, &c.

The justices may record the riot, whether the offenders be in custody at the same time or have escaped. 1 *Haw.* 161.

The record of a riot taken on view of the justices is not traversable. But if it find the parties guilty of any other offence, as felony, maim, &c. it may be traversed as to those offences. And as the parties can only avail themselves of the insufficiency of the record, too much certainty cannot be observed. See 1 *Haw.* 162.

By *Virginia Laws* (1 *Rev. Code*, ch. 27, sect. 3, 4, 5, 6, p. 35, 36.) if the riot, &c. is not found by reason of partiality in the jury, the justices, &c. shall certify the same to the general court; and on failure of the justices, &c. a commission shall go from the general court, at the instance of the party grieved; no person to be imprisoned for a riot, for a longer space of time than one year. See the above recited act.

### (A) *Record of a riot on view.*

county, to wit.

Be it remembered, that on the                      day of                      in the year                      We, J P and K P, two of the justices of the peace for the commonwealth, assigned to keep the peace in the said county, and A S, sheriff of the said county, at the complaint and request of A J, of                      in the county aforesaid, yeoman, in our proper persons have come to the mansion house of him the said A J, in                      aforesaid, and then and there do find A O, of                      yeoman, B O, of                      yeoman, C O, of                      yeoman; and other malefactors and disturbers of the peace of the said commonwealth, to us unknown, in a warlike manner arrayed, to wit, with clubs, swords, and guns, unlawfully, riotously, and routously assembled, and the same house besetting, many evils against him the said A J threatening, to the great disturbance of the peace of the said commonwealth, and terror of the people, and against the form of the statute in that case made and provided. And therefore we, the aforesaid J P, K P, and A S, the aforesaid A O, B O, and C O, do then and there cause to be arrested, and to the next jail of the said commonwealth, in the county aforesaid, to be conveyed, by our view and record of the unlawful assembly, riot, and rout aforesaid convicted, there to remain, every and each of them respectively, until they shall be discharged by due course of law. In witness whereof, to this our present record, we do put our seals. Dated at                      aforesaid, the day and year aforesaid.

### (B) *Commitment of the rioters upon view.*

county, to wit.

J P and K P, two of the justices of the peace of the commonwealth, assigned to keep the peace within the said county, and A S, sheriff of the said county; to the keeper of the jail of the said county.

Whereas upon complaint made unto us, by A J, of                      yeoman, we did this present                      day of                      go to the house of the

said A J, at aforesaid, and there did see A O, of yeoman, B O, of yeoman, C O, of yeoman, and other malefactors to us unknown, assembled together in an unlawful, riotous, and riotous manner, to the terror of the people, and against the peace and dignity of the commonwealth, and against the form of the statute in that case made and provided. We do therefore send you, by the bringers hereof, the bodies of the said A O, B O, and C O, convicted of the said riot, rout, and unlawful assembly, by our own view, testimony, and record; commanding you, in the name of the commonwealth, to receive them into the said jail, and them and every of them respectively, there safely to keep, until they be discharged by due course of law. Given under our hands and seals, at aforesaid, in the county aforesaid, the day and year aforesaid.

*(C) Precept to summon a jury.*

county, to wit.

J P and K P, two of the justices of the peace of the commonwealth, for the county aforesaid, To the sheriff of the said county, greeting: On behalf of the commonwealth, we command you, that you cause to come before us at in the county aforesaid, on the day of next ensuing, twenty-four honest and lawful men of the county aforesaid, to inquire for the commonwealth, and for our indemnity in this behalf, upon their oath, of certain riots, routs, and unlawful assemblies, at in the county aforesaid, lately committed, as it is said. And this you shall in no wise omit, on pain of twenty pounds. Given under our hands and seals, at aforesaid, in the county aforesaid, the day of in the year of the commonwealth.

*Juror's Oath.*

You shall true inquiry and presentment make, of all such things as shall come before you, concerning a riot, rout, and unlawful assembly, said to have been lately committed at in this county; you shall spare no one for favour or affection, nor grieve any one for hatred or ill will, but proceed herein according to the best of your knowledge, and according to the evidence which shall be given to you. So help you God.

The oath which your foreman hath taken on his part, you and every of you shall well and truly observe and keep on your parts. So help you God.

*(D) The inquisition, indictment, or presentment of the jury.*

county, to wit.

An inquisition for the commonwealth, indented and taken at in the county aforesaid, the day of in the year of the commonwealth, by the oath of (insert all the jurors' names) honest and lawful men of the county aforesaid, before J P and

K P, justices of the peace for the county aforesaid, who say, upon their oath aforesaid, that A O, of yeoman, B O, of yeoman, C O, of yeoman, together with other malefactors and disturbers of the peace of the said commonwealth, to the jurors aforesaid as yet unknown, on the day of now last past, at aforesaid, in the county aforesaid, with force and arms, to wit, with clubs, swords, and guns, unlawfully, riotously, and riotously, did assemble, to disturb the peace of the said commonwealth, and so being then and there assembled and gathered together, the mansion house of A J, yeoman, at aforesaid, unlawfully, riotously, and riotously did enter, and in and upon him the said A J, then and there unlawfully, riotously, and riotously did make an assault, and him the said A J, then and there unlawfully, riotously, and riotously did beat, wound, and ill treat, in disturbance of the peace of the said commonwealth, and to the terror of its citizens, against the form of the statute in such case made and provided, and against the peace and dignity of the commonwealth.

A B.  
C D.  
E F, &c.

*(E) Certificate to the general court.*

We, J P and K P, two of the commonwealth's justices of the peace for the county of and J S, sheriff of the said county, do hereby certify, that on the day of we received credible information, that a great riot and unlawful assembly had been committed, by divers persons, at in the said county, who had dispersed themselves, whereupon we made our precept to the sheriff, to summon a jury of twenty-four fit persons, to meet us at the place aforesaid, on this day, to inquire of and concerning the said riot; and the sheriff having returned a jury of twenty-four fit persons, twelve whereof appeared, and were sworn to inquire of the said riot. Whereupon it was fully proved, that A O, &c. of &c. labourer, did, on the day of last past, unlawfully assemble, armed in a hostile manner, to wit, with guns, &c. (*here describe their armour and actions particularly*) nevertheless, the jurors aforesaid did not find the said riot, by reason that C O, D O, &c. were then and there present, and did labour with the said jurors, by embracery and maintenance, not to find the same as appeared to us. Certified, &c.

To the honourable the judges of the general court.

*(F) Indictment for a riot.*

The jurors, &c. upon their oath present, That A O, late of the parish of in the county of yeoman, B O, of the same, yeoman, and C O, of the same, yeoman, and divers other persons (to the jurors aforesaid as yet unknown) on the day of in the year at the parish aforesaid, in the county aforesaid, with force and arms, unlawfully, riotously, and riotously, did assemble and gather together, to disturb the peace of the commonwealth; and so being then and there assembled and gathered together, in and upon one A J, in the peace

of God and of the commonweath then and there being, unlawfully, riotously, and routously, did make an assault, and him the said A J then and there unlawfully, riotously, and routously did beat, wound, and ill treat, and other wrongs to the said A J then and there unlawfully, riotously, and routously did, to the great damage of the said A J, and against the peace and dignity of the commonwealth.

## RIVERS.

FEW parts of the act of assembly respecting obstructions of rivers, or other water courses, fall under the jurisdiction of a justice of the peace. The following sections of the act in *Rev. Code*, ch. 105, p. 199, are all that will be noticed.

By sect. 14. A person fixing in any water course, any dam, hedge, weir, seine, drag, or other stoppage, whereby navigation or the passage of fish may be obstructed, except for the purpose of working some machine or engine of public utility, shall be guilty of a nuisance.

Sect. 15. The county courts may contract for the clearing of rivers within their county; provided that it shall not extend to clearing such obstructions as require the use of gunpowder; nor to the rivers *Me-herrin, Nottoway, Roanoke, and Rappahannock*, above the falls.


Sect. 16. To fall a tree across any run, on which there is a public bridge, without removing it in forty-eight hours, subjects the offender to a forfeiture of two dollars for each tree.

### *Warrant against a person for falling a tree into a river, &c.*

county, to wit.

Whereas information hath this day been made to me, by A J, that A O, of the said county, did, on the                      day of                      last past, fell a tree into the river (*or creek, or run, as the case may be*) across which several public bridges are built; and did not cut and carry away the same within forty-eight hours thereafter. Therefore I require you, &c.

To A C, Constable.

 For laws respecting the passage of fish, in James River and its navigable branches, see *Sessions Acts of* 1802, ch. 9, p. 9; 1804, ch. 27, p. 29; 1805, ch. 93, p. 51; 1807, ch. 63, p. 58; 1808, ch. 73, p. 67.

## ROADS.

IT has been usual, in treatises of this kind, to consider the law respecting *Roads*, under the title of *highways*; but as the term *Roads* is adopted by the legislature, and is generally better understood than *highways*, I have thought it most proper to use this title; inserting so much of the act of assembly only as falls under the notice of a single magistrate. See 1 *Rev. Code*, ch. 19, p. 26. *Ibid.* ch. 219, p. 372. *Ibid.* ch. 291, p. 423.

By sect. 4. (1 *Rev. Code*, p. 27.) All male labouring persons, of the age of sixteen years or upwards, except those owning two or more slaves of that age, are required to work on some public road; on failure, after notice by the surveyor, to attend with proper tools, each person forfeits seven shillings and six pence, to be paid by himself, if a freeman of full age, if an infant, by his parent or guardian, and if a slave, by his overseer or master.

The clerk of the court, within ten days after the appointment of a surveyor of a road, is to deliver a copy of the order to the sheriff, under the penalty of five dollars; the sheriff before the next court, after the receipt of the order, shall deliver a copy of it to the surveyor, and return the original to the office, under the penalty of five dollars. And each clerk shall once in every year fix up in the court-house, a list of the names and precincts of all the surveyors of public roads in his county, under the penalty of fifteen shillings. 1 *Rev. Code*, ch. 219, p. 372. altered from ch. 19, sect. 5, p. 27.

Every surveyor of a road shall keep it well cleared and smoothed, and thirty feet wide; at every fork or cross road, a sign-post, or stone, shall be erected, and constantly kept in repair, directing in large letters, to the most noted place to which the road leads, and may take stone or wood for that purpose from any adjoining land, for the expense of which the court shall reimburse the surveyor in their next county levy; all necessary bridges and causeways to be made by the surveyor, twelve feet wide, and safe, and for that purpose may take timber, stone, or earth, from any adjoining land, the same being first valued by two honest house-keepers appointed and sworn by a justice; but not to take any earth, &c. from a lot in a town, without permission of the owner; where wheel-carriages are necessary, a justice of the peace may empower the surveyor to impress them from persons whose hands are liable to work on his road, and appoint two honest house-keepers, who, being sworn, shall value, by the day, the use of such carriage and horses, upon a certificate of which valuation, and of the surveyor, of the number of days, the owner shall be entitled to an allowance in the next county levy. In like manner shall the owner of timber, &c. be

entitled, on a certificate of the house-keepers. Every surveyor, failing to do his duty herein, forfeits fifteen shillings for each offence. 1 *Rev. Code*, ch. 19, sect. 6, p. 27.

If any person shall fell a tree into a public road, or into any stream of water whereon there is a public bridge, and shall not remove it within forty-eight hours; or kill a tree within the distance of fifty feet from the public road, or destroy or deface a sign-post, it shall be deemed a nuisance. The penalty is ten pounds. Where any fence shall be made across any public road, the owner or tenant of the land shall pay ten shillings for every twenty-four hours it shall be continued. *Ibid.* sect. 9, p. 28.

The owner or occupier of a dam, over which a public road passes, shall keep it in repair twelve feet wide, and shall make a bridge of like breadth, with strong rails on each side, over the pier-head, flood-gates, &c. under penalty of ten shillings for every twenty-four hours failure. But where the mill has been destroyed by accident, the penalty shall not be recovered until one month after she has been repaired, so as to have ground one bushel of grain. 1 *Rev. Code*, ch. 19, sect. 10, p. 28.

All the penalties in this act, not otherwise directed, shall be one moiety to the informer, and the other to the use of the county, recoverable with costs, on warrant, petition, or action, as the case may be. Any justice, who, upon his own view, shall discover a road, bridge, causeway, or mill dam, out of repair, shall issue a warrant against the delinquent, and if no reasonable excuse be made for such default, may give judgment for the penalty and costs, not exceeding twenty-five shillings, or the offenders may be presented by the grand juries; and in all convictions, on view of a justice, presentment, or private information to justices, where there shall be no evidence to convict the offender but the informer's own oath, the whole penalty shall be to the county, to be collected and accounted for by the sheriff, as county levies; and every justice, on making a conviction, shall certify the same to the clerk of the county, who shall yearly, before the first day of March, deliver to the sheriff a list of all the offenders so certified, and of all others convicted in court, within one year preceding, of any offence against this act. *Ibid.* sect. 11.

Prosecutions for offences against this act are to be commenced within six months after the offence, and not after. *Ibid.* sect. 12.

As to the mode of discontinuing roads, and privilege granted to owners of coal mines to establish roads, see 1 *Rev. Code*, ch. 291, p. 423.

(A) *Warrant for failing to send, or attend to keep the road in repair, on 1 Rev. Code, ch. 19, sect. 4, p. 27.*

county, to wit.

Complaint being this day made to me, J P, a justice of the peace for the county aforesaid, by A J, that F O did, on the \_\_\_\_\_ day of \_\_\_\_\_ last, fail to go and assist, with proper tools, on the request of W S, surveyor of the road from \_\_\_\_\_ to \_\_\_\_\_ in the said county, to clear and repair the said road (or to send W S, a servant,

or male labouring slaves, above the age of sixteen years, belonging to the said F O) contrary to the act of the general assembly. These are therefore to require you to summon the said F O to appear before me, or some other justice of the peace for the said county, to answer the premises. Given, &c.

To A C, constable.

### *Judgment.*

On hearing the within complaint, it being duly proved before me that the within named F O did fail to attend with proper tools (or to send male labouring slaves, belonging to him the said F O, above the age of sixteen years) to assist in repairing the said road, by which he hath forfeited seven shillings and six pence (or, according to the number he failed to send.) It is therefore considered, that the within named F O pay the said sum of the one half thereof to the use of the said A J, the informer, and the other to the use of the said county, towards lessening the levy thereof, together with the costs.

Costs                      cents.

### *(B) Warrant against the clerk, on 1 Rev. Code, ch. 219, p. 372.*

to wit.

Complaint having been this day made to me, by A B, that C D was, at a court held for this county, on the                      day of                      appointed surveyor of a public road in the said county, and that E F, clerk of the said county court, hath failed to deliver to the sheriff a copy of the order of the said appointment, within ten days after the same was made, as the law directs. You are therefore required to summon the said E F to appear before me, or some other justice of the peace of this county, to shew cause why the penalty of five dollars should not be levied on him for his said neglect. Given, &c.

### *(C) Against the sheriff.*

to wit.

Complaint being made by A B, that C D was, at a court held for this county, on the                      day of                      appointed surveyor of a road in the said county, and a copy of the order for his appointment was in due time, by the clerk of the court, delivered to E F, deputy sheriff of this county, and that he the said E F failed to serve the said C D with a copy of the said order, before the next court held for the said county, as the law directs. You are therefore, &c. as in the former.

### *(D) Warrant, on 1 Rev. Code, ch. 19, sect. 6, p. 27.*

to wit.

Whereas A B, surveyor of the road from                      to                      hath given me information, that the assistance of wheel carriages is neces-



sary for making (or repairing) a causeway in the said road; I therefore empower the said A B to impress such necessary wheel carriages, draught horses, or oxen, with their gear and driver, belonging to any person, who, or their servants or slaves, are appointed to work on the said road; he the said A B having procured a valuation by the day to be made thereof, by C D and E F, two honest house-keepers hereby appointed for that purpose, who being sworn before me, or some other justice of the peace of this county, are to make such valuation, and give the owner or owners a certificate thereof, to entitle him or them to an allowance for the same in the next county levy. Given under my hand and seal, &c.

*(E) Certificate of the valuation.*

We the subscribers, being first sworn, pursuant to a warrant from J P, have this day viewed a cart and two horses (*or oxen*) with their driver, belonging to J K, and impressed by A B, to assist in making a causeway in the road wherof he is surveyor, and do value the use of the said cart, horses (*or oxen*) and driver, to by the day.  
Certified the       day of       in the year

C D.  
E F.

*Certificate thereon by the surveyor.*

I do certify, that the cart, horses (*or oxen*) and driver, above mentioned, were employed       days in the service, for which they were impressed. A B.

☞ The same proceedings are had for timber, &c.

*(F) Warrant against a surveyor, for not keeping the road in repair, on the same section.*

to wit.

Complaint, &c. (*as in the first*) that S L, surveyor of the road from to       in the said county, has failed to clear and keep the said road in repair, contrary to the act of assembly in that case made. These are therefore, &c.

The judgment the same as the first, except as to the fine, which in this instance is fifteen shillings, with costs.

*(G) Warrant against a surveyor, for not setting up a sign-post, on the same section.*

to wit.

Complaint, &c. (*as in the former*) that C D, surveyor of a road in this county, at a fork or crossing thereof, hath failed to keep, set up, or renew, a stone or post where the said roads join, with inscriptions thereon, directing to the most noted place to which each of the said

joining roads lead, as the act of assembly directs: You are therefore, &c. (*as in the first.*)

Judgment the same as on warrant (A) changing the sum to fifteen shillings, with costs.

The penalty for running a fence across a public road, on sect. 9, seems more properly recoverable by indictment.

(H) *Warrant on 1 Rev. Code, ch. 19, sect. 10, p. 28.*

to wit.

Complaint being made to me, by A B, that C D, the owner (or occupier) of a mill, over the dam of which a public road leads, in this county, hath failed to keep the said dam in repair, of the breadth of twelve feet at top, for twenty-four hours last past (or hath failed to keep a good and sufficient bridge, twelve feet wide at top, and well railed on each side, over the pier-head, or waste, in the said mill dam, as the case shall be) according to the act of assembly in that case made. You are therefore required to summon the said C D to appear before me, or some other justice of the peace of this county, to shew cause why the penalty of ten shillings should not be levied on him for his said failure, according to the said act of assembly; and then make return of this warrant. Given, &c.

To A C, constable.

(I) *Judgment.*

On hearing the within complaint, the defendant is proved to be guilty. Therefore it is considered that he pay the sum of ten shillings for his said neglect, one half to the said A B, and the other to the use of the said county, and that he also pay the costs. Given under my hand, &c.

Costs                      cents.

(K) *Warrant against the surveyor, on sect. 11, p. 28, 29.*

to wit.

Whereas, upon my own view, I have found a public road in this county, whereof A B is surveyor, not kept in good repair, as the act of assembly directs. You are therefore required to summon the said A B to appear before me, or some other justice of the peace of this county, to shew cause why the penalty of fifteen shillings should not be levied on him for his neglect, according to the said act. Given, &c.

(L) *Judgment on hearing.*

On hearing, the defendant not shewing any reasonable cause to the contrary, it is considered that he pay the sum of fifteen shillings for his neglect, for the use of this county, to be applied towards lessening the levy thereof, and that he pay the costs. Given, &c.

*(M) Judgment by default.*

The within named A B, being summoned, and failing to appear and shew any reasonable cause to the contrary, it is considered, &c. *(as in the last.)*

*(N) Warrant against the owner of a mill.*

to wit.

\* Whereas, upon my own view, I have found a mill dam *(or bridge over the pier-head or flood-gates of a mill dam)* belonging to A B, of this county *(or across the boundary between this and the county of )* over which a public road leads, not kept in good repair, as the act of assembly directs. You are therefore, &c. *(as in the former.)*

The judgment is the same as in the former, changing the penalty to ten shillings.

*Indictment for a nuisance, on 1 Rev. Code, ch. 19, sect. 9, p. 28.*

county, to wit.

The jurors, &c. upon their oath present, That A O, late of in the county aforesaid, yeoman, on the day of in the year with force and arms, at in the said county, in and upon the common highway and public road there, leading from unto the town of did fall a tree, and the same tree so as aforesaid fell, from the aforesaid day of in the year aforesaid, until the day of exhibiting this information, in and upon the common highway aforesaid, to lie and remain, hath permitted, and doth still permit, to the grievous and common nuisance of all the citizens of the said commonwealth, upon and through the common highway aforesaid going, passing, riding and travelling, against the form of the statute in that case made and provided, and against the peace and dignity of the commonwealth.

For other offences against the ninth section, vary the description of the offence so as to suit the act of assembly, and conclude as in the above precedent, to the *common nuisance*, &c.

## ROBBERY.

ROBBERY (from the French *de la robe*, according to lord Coke; or the Saxon *reofere*, according to doctor Burn) is, *a felonious and violent taking away from the person of another, goods or money to any value, putting him in fear.* *Haw. B. 1, ch. 34, sect. 3. 4 Bl. Com. 241.*

There are two kinds of robbery; from the *person*, and from the *house*. Robbery from the *person* will be treated of under this title; robbery from the *house* has already been considered, under the titles of BURGLARY and LARCENY.

In the explication of this subject, I shall consider,

- I. What taking away will be sufficient to constitute robbery.*
- II. What shall be said to be a taking from the person.*
- III. What kind of taking shall be said to be violent.*
- IV. In what respects robbery differs from other larcenies, in the crime and punishment.*

### I. WHAT TAKING AWAY WILL BE SUFFICIENT TO CONSTITUTE ROBBERY.

It seems clear, that he who receives my money by my delivery, either while I am under the terror of his assault, or afterwards, whilst I think myself bound in conscience to give it to him by an oath to that purpose, which in my fear I was compelled by him to take, may, in the eye of the law, as properly be said to take it from me, as he who actually takes it out of my pocket with his own hands. *Haw. B. 1, ch. 34, sect. 4.*

Neither can he who has once actually completed the offence, by taking my goods in such a manner into his possession, afterwards purge it by any re-delivery. The outrage offered to the rights of society doth not vary in its nature, because ineffectual in its consequences. Therefore where a robber, having taken a purse, returned it again, saying, "if you value your purse, take it, and give me the contents;" but was seized before the money was re-delivered, he was found guilty; for the continuance of the property in the possession of the robber is not required by law. *Ibid.* (7th edit.) vol. 4. p. 234.

But he who only attacks me in order to rob me, but does not take my goods into his possession, though he goes so far as to cut off the girdle of my purse, by reason whereof it falls to the ground, is not guilty of robbery; but highly punishable at the common law by fine

and imprisonment, &c. for so enormous a breach of the peace. *Haw. B. 1, c. 34, sect. 6.*

It is immaterial of what value the thing taken is; a penny as well as a pound, thus forcibly extorted, makes a robbery. *4 Bl. Com. 242.*

Yet in some cases a man may be said to rob me, where in truth he never actually had any of my goods in his possession; as where I am robbed by several of one gang, and one of them only takes my money, in which case, in judgment of law, every one of the company shall be said to take it, in respect of that encouragement which they gave to another, through the hopes of mutual assistance in their enterprise. Nay, though they miss of the first intended prize, and one of them afterwards ride from the rest and rob a third person in the same highway, without their knowledge, out of their view, and then return to them, all are guilty of robbery, for they came together with an intent to rob, and to assist one another in so doing. *Haw. B. 1, c. 34, sect. 7.*

## II. WHAT SHALL BE SAID TO BE A TAKING FROM THE PERSON.

Not only the taking away a horse from a man, whereon he is actually riding, or money out of his pocket, but also the taking any thing from him openly and before his face, which is under his immediate and personal care and protection, may properly enough be said to be a taking from the person. And therefore he who, having first assaulted me, takes away my horse standing by me, or having put me in fear, drives my cattle in my presence out of my pasture, or takes my purse, which in my fright I cast into a bush, or my hat which fell from my head, or robs my servant of my money before my face, may be indicted as having taken such things from my person. *Haw. B. 1, c. 34, sect. 8.*

Fear is the distinguishing ingredient between robbery and other larcenies. (*3 Inst. 68.*) Therefore, where a thief clandestinely stole a purse, and on its being discovered in his custody, denounced vengeance against the party, if he spoke of it, and then rode away, it was held to be simple larceny only, and not robbery; because the fear, excited by the menaces of the thief, was subsequent to the act of taking the purse. *2 Rol. 154. 1 Hale 535.*

So where a man intoxicated is kicked and abused, and his money taken from him; for there is no demand of money or fear excited. *Haw. (7th edit.) vol. 4. p. 235.*

## III. WHAT KIND OF TAKING SHALL BE SAID TO BE VIOLENT.

Wherever a person assaults another, with such circumstances of terror as put him into fear, and causes him by reason of such fear to part with his money, the taking thereof is adjudged robbery, whether there were any weapon drawn or not, or whether the person assaulted delivered his money upon the other's command, or afterwards gave it him, upon his ceasing to use force and begging an alms, for he was

put into fear by his assault, and gives him his money to get rid of him. *Haw. B. 4, ch. 34, sect. 9.*

But it is not necessary that the fact of actual fear should either be laid in the indictment or be proved upon the trial. It is sufficient if the offence be charged to be done *violently and against his will*. And if it appear upon the evidence to have been attended with those circumstances of violence or terror, which in common experience are likely to induce a man to part with his property against his consent, either for the safety of his person, or for the preservation of his character and good name, it will amount to a robbery, *Fost. 128. 4 Bl. Com. 242. Haw. (7th edit.) vol. 4. p. 235.*

Accordingly, to snatch a basket of linen suddenly from the head of another; or to pull an ear-ring from the ear of a lady; or if an officer feloniously take money from a prisoner not to take her to jail, under colour of authority, &c. without, in either case, having made any express demand, have been ruled sufficient acts of violence to constitute the crime of robbery. *Haw. (7th edit.) B. 1, ch. 34, sect. 10.*

And to obtain property, by threatening to accuse another of having been guilty of an unnatural crime, has been held, upon the solemn opinion of all the judges, to be an act sufficient to raise in the mind of the party menaced such a *terror* and apprehension of mischief, as to constitute the offence by *putting in fear*; for the law, in *odium spoliatoris*, will presume fear where there appears to be so just a ground for it. *Ibid. sect. 11.*

But the taking must be *against the will* of the person robbed; and therefore if A agree to be robbed by B, and A places himself in a certain place for that purpose, and B, pursuant to the agreement, take the goods from him by actual force, yet it is no robbery. *Ibid. sect. 12. and Fost. 123, 128.*

But if a person, knowing a certain highway-man infects a particular road, go that road, and in order to detect him, suffer himself to be robbed by him, the property shall be considered as taken not only from his person, but against his will. *Ibid. sect. 13. and Fost. 129.*

And some have gone so far as to hold, that if a man meeting another going with his goods to market, in order to sell them, compel him to sell them to him against his will, he is guilty of robbery, though he give for them more than they are worth. But perhaps this opinion is too severe, because the grievance to the party seems rather to proceed from the perverseness of his humour, than from any real injury done him; and there seems to be no such enormity in the intention of the wrong-doer as is implied in the notion of felony. *Haw. (7th edit.) B. 1, c. 34, sect. 14.*

However, it is certain that the claim of property in the thing taken away, without any colour, is no manner of excuse. *Ibid. sect. 15.*

#### IV. IN WHAT RESPECTS ROBBERY DIFFERS FROM OTHER LARCENIES IN THE CRIME AND PUNISHMENT.

First, No other larceny shall have judgment of death, unless the thing stolen be above the value of twelve pence; but robbery shall

have such judgment, how small soever the value may be of the thing taken away. *Haw. B. 1, ch. 34, sect. 12.*

Secondly, Other larcenies, whether from the person or not, shall not be supposed to be done with violence or terror, but robbery is always laid as done on an assault with violence, and putting the party in fear. *Ibid. sect. 13.*

Thirdly, But they all agree in this, that the offenders had the benefit of clergy at the common law. *Ibid. sect. 14.*

Robbery was excluded from clergy by the laws of Virginia (1 *Rev. Code*, ch. 47, sect. 1, p. 45.) afterwards it was punishable by confinement in the penitentiary, for a period not less than three nor more than ten years (1 *Rev. Code*, ch. 200, sect. 5, p. 356) and finally, not less than five nor more than ten years. 2 *Rev. Code*, ch. 41, sect. 1, p. 70.

If any person shall steal, or take by robbery from another, any bank or post note, then every such person, being duly thereof convicted, shall be sentenced to suffer imprisonment in the jail and penitentiary house, for a period of time not less than three years, nor more than ten years. *Ibid. ch. 91, sect. 3, p. 118.*

### (A) *Warrant for robbery.*

to wit.

Whereas A I of                      in the said county, hath this day given information upon oath before me, J P, a justice of the peace for the county aforesaid, that on the                      day of                      in the year                      in the commonwealth's highway (or other place, according to the fact) leading from                      to                      he was assaulted, and put in bodily fear and danger of his life, and                      of the value of                      of the goods and chattels of the said A I, from the person and against the will of the said A I, then and there were feloniously and violently stolen, taken, and carried away; and that he hath just cause to suspect, and doth suspect, that B O, of                      did commit the felony and robbery aforesaid. These are therefore, in the name of the commonwealth, to require you to apprehend the said B O, and bring him before me, or some other justice of the peace for the county of                      aforesaid, to answer the said charge, and further to be dealt with according to law. Given under my hand and seal, &c.

To                      to execute.

☞ If the robber be unknown, which is most frequently the case, then the most effectual course would be to pursue him by *hue and cry*; for which see the precedents under that title.

☞ For a *commitment*, and other precedents, see title CRIMINALS; taking care to describe the offence as in the following indictment.

### (B) *Indictment of felony for robbery, from the person, on the highway.*

county, to wit.

The jurors, &c. upon their oath present, That E H, late of the parish of                      in the county of                      labourer, on the                      day of

in the        year        with force and arms, at the parish aforesaid, in the county aforesaid, in the commonwealth's highway there, in and upon one W T, in the peace of God and of the said commonwealth then and there being, feloniously did make an assault, and him the said W T in bodily fear and danger of his life, in the highway aforesaid, then and there feloniously did put, and        of the value of dollars (*recite all the goods taken*) of the goods and chattels of the said W T, from the person and against the will of the said W T, in the highway aforesaid, then and there feloniously and violently did steal, take, and carry away, against the peace and dignity of the commonwealth.

## RUNAWAYS.

BY *Virginia Laws* (1 *Rev. Code*, ch. 131, p. 246.) any person may apprehend a servant or slave, suspected to be a runaway, and carry him before a justice, who, if to him the servant or slave appear, by the oath of the apprehender, to be a runaway, shall give a certificate of such oath, and the distance, in his opinion, between the place where the runaway was apprehended and that from whence he fled; and the apprehender shall convey the runaway to the last mentioned place, or deliver him to the owner, or some other authorised to receive him (which the apprehender *must* do, if the owner or overseer resides in the county where the runaway is taken up) or deliver him to the jailor of the county or corporation in which he was apprehended, and shall be entitled to two dollars (2 *Rev. Code*, ch. 122, sect. 1, p. 155.) and ten cents for every mile he shall convey him, to be paid by the owner; the jailor shall cause a description of the runaways's person and wearing apparel to be set up at the door of his court-house.

If the owner claim not within two months thereafter, the sheriff or sergeant shall publish a like advertisement, for three months, in any public newspaper most convenient (2 *Rev. Code*, p. 155.) and shall hire the runaway, under the direction of the court,\* having put an iron collar, stamped with the letter F, round his neck, and out of his wages pay the reward for apprehending, and the expences incurred on his account; but he shall deliver the runaway even before the time

\* The law, in this respect, has since been altered, by act of 1807, which enacts, "That if any runaway slave be hired out by any sheriff or sergeant, and the owner claim not within three months, the said sheriff or sergeant shall proceed to hire the runaway out for three months more; and so on for twelve months, unless the owner sooner claim such runaway. If the owner claim not within twelve months, the sheriff or sergeant shall advertise for one month, in some public newspaper, the time and place of selling the said runaway." See 2 *Rev. Code*, ch. 122, sect. 3, p. 155.



aspire, and pay the balance of the wages, if any, to him who shall claim, and who having proved before the court of some county or corporation, or a justice of the peace of the county or corporation, in which such runaway is confined, that he had lost such a one as was described in the advertisement, and having there given security to indemnify the sheriff or sergeant, shall produce the clerk's or the justice's certificate, of such proof made, and security given, proved by his own or another's oath, the runaway when shewn to him to be the same that was so lost, and pay so much as the expences aforesaid shall exceed the wages. 1 *Rev. Code*, ch. 131, sect. 2, p. 246.

If the runaway be a slave, after the end of one year from the last advertisement,\* he shall be sold, and the proceeds of the sale, with the balance of the wages paid to the public treasury, for the use of the owner, proving his property at any future time, or otherwise, for the use of the commonwealth.

If the runaway die in jail, the expences shall be defrayed by the public. *Ibid.* sect. 4.

If the runaway has crossed the bay of Chesapeake, he shall be delivered to the sheriff of some county bounded thereby, who shall transport him to the other side, and cause him to be put into the hands of a constable, to be by constable to constable conveyed to the owner, who shall pay the sheriff twenty dollars, and the constable ten cents a mile. *Ibid.* sect. 5.

The rewards may be recovered by *warrant, petition, or action*, as the case may require *Ibid.* sect. 6, p. 246.

The jailor's fees are twenty-five cents for the commitment, and the same for releasement; for every twenty-four hours keeping seventeen cents; a sheriff, sergeant, or jailor, taking more than legal fees, forfeits four dollars for each offence, besides what he had received, recoverable before a justice of the peace. *Ibid.* sect. 7.

(A) *Magistrate's certificate to the apprehender of a runaway.*

county, to wit.

I, J P, being a justice of the peace for the aforesaid county, do hereby certify, that B T, of the county of                    hath this day made oath before me, that                    a negro slave, whom he hath now brought before me, is a runaway, that he has just grounds to believe the said slave is the property of C M, of the county of                    that he was taken up on the                    day of                    in the year                    in the county of                    at the house of                    and the distance, in my opinion, between the said place, where the said slave was apprehended, and the residence of the said C M (or, if he fled from a plantation or quarter of the owner, then the distance to such place) is                    miles. Given under my hand, this                    day of                    in the year                   

☞ The fees are two dollars for taking up, and ten cents for every mile of conveyance. And if the runaway be carried to prison,


\* See note in preceding page.

and certify the distance between the place where the slave was apprehended and the jail of the county.

*(B) Certificate of a justice as to the right of property.*

to wit.

I, J P, a justice of the peace for the county aforesaid, do hereby certify, that satisfactory proof hath this day been made before me, by the oath of A W, of that B O, of some time on or about the day of in the year lost a certain negro slave, named *(here describe the slave particularly)* and that the said slave is the same which has been committed to the jail of the county of as a runaway. Given under my hand, &c.

 Proof may also be made before the court of a county or corporation.

*(C) Bond to indemnify the sheriff or sergeant.*

*(The penalty may be in the common form, payable to the high sheriff or sergeant, with the following condition.)*

The condition of the above obligation is such, that whereas B O, of hath produced the certificate of J P, a justice of the peace for the county of *(or, of A C, clerk of the court of as the case may be)* that a certain negro slave, named committed to the jail of the said county of as a runaway, is the property of him the said B O; whereupon the said slave has been delivered to the said B O. Now if the said B O shall well and truly indemnify and save harmless the said *(sheriff or sergeant)* from all loss or damage, which may accrue to him in consequence of his having delivered up the said negro slave, then the above obligation to be void, else to remain in full force.

*(D) Warrant against a sheriff, jailor, &c. for taking more than legal fees.*

county, to wit.

To constable.

Whereas complaint hath this day been made before me, J P, a justice of the peace for the county aforesaid, by A J, of that B J, jailor of the said county, did, on the day of last past, demand and take from him, the said A J, dollars, as prison fees for the commitment, releasement, and days maintenance of a negro slave belonging to the said A J, committed to the jail of his said county as a runaway; being more than the fees allowed by law. These are therefore to require you to summon the said B J to appear before me, or some other justice of the peace for this county, to shew cause why the penalty of four dollars should not be levied upon him for his said offence, and moreover refund all mo-

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mies which he may have received from the said A J, over and above the legal fees. Given under my hand and seal, this day of in the year

The form of judgments, executions, &c. may be found under title WARRANTS, &c.

## SABBATH.

" IF any person, on a sabbath day, shall himself be found labouring at his own, or any other trade or calling, or shall employ his apprentices, servants, or slaves, in labour or other business, except it be in the ordinary household offices of daily necessity, or other work of necessity or charity, he shall forfeit the sum of one dollar and sixty seven cents for every such offence, deeming every apprentice, servant, or slave, so employed, and every day he shall be so employed, as constituting a distinct offence." 1 Rev. Code, ch. 138, sect. 5, p. 276.

### *Warrant against a person for labouring on a sabbath day.*

county, to wit.

Whereas complaint and information, on oath, hath this day been made to me, J P, a justice of the peace for the county aforesaid, by A J, that A O, of the said county, shoemaker, was found labouring at his trade, to wit, in making shoes, on the day of last past, on the day commonly called *sabbath day*, at the county aforesaid, contrary to the act of assembly in that case made and provided, whereby the said A O hath forfeited the sum of one dollar and sixty-seven cents, for his said offence. These are therefore, &c.

The form of the judgment, execution, &c. may be found under title WARRANT, &c.

☞ No process shall be executed on a Sunday; nor on witnesses; nor on persons attending musters of the militia; except in cases of treason, felony, riot, breach of the peace, or escape out of prison or custody, in which cases the process may be executed at any time or place. 1 Rev. Code, ch. 80, sect. 16, p. 122.

So, attachments against absconding debtors may be served on a Sunday. *Ibid.* ch. 78, sect. 14, p. 117.

And an additional penalty of ten dollars is imposed on persons for dealing with a slave on a Sunday, without leave of the owner or overseer. *Ibid.* ch. 305, sect. 3, p. 432.

## SCIRE FACIAS.

1. IF a judgment is recovered, and no execution issued thereon within a year and a day, the law presumes, *prima facie*, that it is extinct, and no execution can issue on such judgment, till it is revived by *scire facias*. Or an action of debt may be commenced on the judgment, which is now seldom done. 3 *Bl. Com.* 421. *Co. Lit.* 290. b. 1 *Saund.* (by Wms.) 72. e. note 3.

2. But if an execution issues within the year, and is continued down several years, a new execution may issue without a *scire facias*. *Str.* 100. *Co. Lit.* 290. *Barnes* 210. 1 *Saund.* (by Wms.) 72. f. note 3.

3. So, if judgment be entered with *stay of execution*, by agreement, till such a time; there needs no *scire facias* till a year and day after the time agreed. *Comy. Dig. EXECUTION* (I, 4.) 1 *Saund.* (by Wms.) 72. f. note 3.

4. So, where the defendant had himself *delayed* the plaintiff, by *injunctions*, &c. it was held that no *scire facias* was necessary, notwithstanding the cases in 1 *Str.* 301. and 1 *Salk.* 322. See 2 *Burr.* 660. 1 *Saund.* (by Wms.) 72. f. note 3.

5. There needs no *scire facias*, if error be brought of the judgment within a year after the judgment, till a year and a day after the error, or judgment thereon affirmed. (*Comy. Dig. EXECUTION* (I, 4.) 5 *Co.* 88. a.) So, if the year had expired before the writ of error sued out, and the judgment be affirmed, or the plaintiff non-suited, or the writ of error discontinued, for it revives the judgment. 1 *Saund.* (by Wms.) 72. e. note 3.

6. The *scire facias* must be in the same county where the judgment was obtained, or execution awarded. *Barnes* 207. *Comy. Dig. EXECUTION* (I, 4.) 2 *Saund.* (by Wms.) 72. 9.

7. Where execution has been taken out after a year and a day, it is not void, but voidable only by a writ of error. 2 *Saund.* (by Wms.) 6. note 1. *citing* 3 *Lev.* 404. 1 *Salk.* 261.

8. It is a general rule, that where a new person, who was not a party to a judgment, derives a benefit by, or becomes chargeable to, the execution, there must be a *scire facias* to make him a party to the judgment. 2 *Saund.* (by Wms.) 6. note 1. 1 *Ld. Raym.* 245. 1 *Salk.* 319. 2 *Ld. Raym.* 768. 2 *Inst.* 471. 2 *Saund.* (by Wms.) 72. i.

9. But if there be two plaintiffs in a personal action, and one of them dies. that shall not put the other to a *scire facias*. So, if one of the defendants die; but a suggestion of the death must be made upon the record. (4 *Bac. Abr.* tit. *EXECUTION*, 413.) Nor, at the common law, did the action abate by the death of one of the defendants, where the

other had the whole by survivorship. Nor, where the action is founded on a tort, as trespass, ejectment, trover, conspiracy, and the like, against two, and one dies, though they are charged jointly. (2 *Saund.* by Wms. 72. i.) And by *Virginia Laws* (2 *Rev. Code*, ch. 101, sect. 1, p. 126. no action shall abate by the death of either party, if it were originally maintainable by or against executors or administrators, but a *scire facias* may be awarded, &c. For the mode of prosecuting which see the above law.

10. If a single woman obtain judgment, or if a judgment be recovered against her, and she marry before execution, a *scire facias* must be brought by or against husband or wife, in order to execute the judgment. (2 *Saund.* by Wms. 72. k. *Tidd's Prac. Forms*, Riley's edit. 323.) But if a wife be sued as a feme sole, and a verdict found for her on the plea of coverture, she may take out execution, for the costs, in her own name, because the plaintiff, having sued her as sole, is concluded from denying it. (*Doug.* 657.) Or the husband and wife may sue out a *scire facias* to have execution. *Ibid.*

11. If husband and wife obtain judgment, for a debt due to the wife before marriage, and the wife die before execution, the husband alone may have a *scire facias*, without taking out administration; or may, it seems, sue out execution in the name of himself and wife without a *scire facias*, for the nature of the debt is altered by the judgment, and it is become a debt due to the husband. 2 *Saund.* (by Wms.) 72. l.

12. If judgment be recovered by a feme sole, and she marry, and then the husband and wife sue out a *scire facias* upon the judgment, and have an award of execution, and afterwards the wife die, the husband alone may have a *scire facias* to execute the judgment. 2 *Saund.* (by Wms.) 72. l.

13. And in like manner, if a *scire facias* is brought against husband and wife, upon a judgment recovered against her when sole, and execution is awarded thereon against both, and afterwards the wife dies, a *scire facias* may be sued out against the husband after her death, to have execution of the judgment against him. 2 *Saund.* (by Wms.) 72. l.

14. But if husband and wife recover judgment for a debt due to the wife as executrix, and the wife die, the husband shall not have a *scire facias* upon the judgment, but the succeeding executor or administrator. 2 *Saund.* (by Wms.) 72. l.

15. It seems clear, that where there are two or more plaintiffs or defendants in a personal action, or one or more of them die after judgment, execution by *feri facias*, or *capias satisfaciendum*, may be had, for or against the survivors, without a *scire facias*. 2 *Saund.* (by Wms.) 72. k.

16. If there be a judgment against A, and thereupon a *feri facias* sued out, but before execution A dies intestate, or leaves executors, there needs no *scire facias* to renew this judgment, but execution of the goods may be made in the hands of the executor or administrator. *Bac. Abr.* tit. EXECUTION (G, 2.)

17. A man may plead in bar, or in abatement to a *scire facias*, as well as to other actions. 2 *Saund.* 72. t.

18. The sheriff, on the return of a *scire facias*, either returns *scire feci* (commonly interpreted, "made known") or, *nihil* (a Latin word,

signifying *nothing*.) On the return of *nihil*, a second or *alias scire facias* issues; and if that be also returned *nihil*, judgment, according to the old practice, was entered against the defendants, two *nihil*s being equal to a service, or *scire feci*. (2 Saund. 72. r, s.) But now, by the laws of Virginia (1 Rev. Code, p. 81, sect. 48, and p. 89, sect. 30.) no judgment shall be entered on the return of two *nihil*s, unless the defendant reside in the district, county, or corporation, or unless he be absent from the commonwealth, and have no known agent or attorney therein; but such *scire facias* may be directed to the sheriff of any county or corporation, where the defendant or his attorney shall reside, or may be found; and being returned served, the court may proceed to judgment, as if the defendant had resided in the county or corporation. And writs of *scire facias* shall also now be served in the same manner as writs of *capias ad respondendum*, except that bail shall not be required. 1 Rev. Code, ch. 231, p. 379.

19. Writs of *scire facias*, to revive a judgment, or actions of debt thereon, shall not be prosecuted after ten years from the date of the judgment. (1 Rev. Code, p. 108, sect. 5.) Nor against executors or administrators, upon a judgment against the testator or intestate, after five years, from their qualification (1 Rev. Code, p. 167, sect. 57.) Saving the rights of infants, femes covert, &c.

How to proceed where the suit had abated by death, or where the parties die between interlocutory and final judgment. See 1 Rev. Code, p. 110, 111. 2 Rev. Code, p. 120, 126.

(A) *Scire facias to revive a judgment obtained before a single magistrate.*

county, to wit.

Whereas on the            day of            in the year            before J.P., a justice of the peace for the county aforesaid, A C recovered a judgment for            dollars, for debt, and            cents, for his costs, against A D, whereof he is convict as appears to me; and forasmuch as the said A C hath complained to me, that he hath not received any satisfaction for his said debt and costs;\* therefore I command you to summon the said A D to appear before me, at            in the county aforesaid, on the            day of            to shew cause why execution should not be made of the debt and costs aforesaid; and that you be then and there, to shew how you have executed this warrant. Given, &c.

(B) *Scire facias against an executor.*

(Pursue form (A) to the asterisk \* at the word 'costs,' then say) and the said A D being dead, as I am informed; and the said A C having applied for remedy in that behalf; and being willing that what is right should be done, I command you to summon ‡ B D, executor of the last will and testament of the said A D, deceased, to appear before me, at            on the            day of            next, to shew cause why the said A C ought not to have execution against him for the debt and costs aforesaid, to be levied of the goods and chattels of

the said A D, in the hands of the said B D, to be administered; and that you be then and there, to shew how you have executed this precept. Given under my hand and seal, &c.

(C) *Scire facias against an administrator.*

(Pursue forms (A) and (B) combined, to this mark † in form (B) then say) B A, administrator of all and singular the goods and chattels, rights and credits, which were of the said A C, deceased, to appear, &c. (conclude as in form (B).)

(D) *Scire facias for an executor.*

(Pursue form (A) to the asterisk \*, then say) and the said A C (the creditor) being dead, as I am informed by A E, executor of the last will and testament of the said A C, deceased, and the said A E having applied for remedy in that behalf; and being willing that what is right should be done, I command you, that you make known to the said A D (the debtor) that he appear before me, at            on the day of            next, to shew cause why the said A E ought not to have execution against him, for the debt and costs aforesaid. Given, &c.

(E) *Scire facias for an administrator.*

(Pursue form (A) to the asterisk \* then say) and the said A C (the creditor) being dead, as I am informed by A A, administrator of all and singular the goods and chattels, rights and credits, which were of the said A C, deceased, at the time of his death, who died intestate, and the said A A having applied for remedy in that behalf; and being willing that what is right should be done, I command you, that you make known to the said A D, that he appear, &c. (conclude as in form (D).)

(F) *Scire facias by husband and wife, upon a judgment recovered by the wife while sole.*

Pursue form (A) to the asterisk \* then say) and the said A C (the name of the wife before marriage) hath since intermarried with B H, as I am informed; and the said B H and A his wife having applied for remedy in this behalf; and being willing that what is right should be done, I command you, that you make known to the said A D, that he appear before me, at            on the            day of            next, to shew cause why the said B H and A his wife ought not to have execution against him, for the debt and costs aforesaid, Given, &c.

(G) *Scire facias against husband and wife, upon a judgment recovered against the wife while sole.*

(Pursue form (A) to the asterisk \* then say) and the said A C (the name of the wife before marriage) hath since intermarried with B H,

as I am informed ; and the said A C having applied for remedy in this behalf ; and being willing that what is right should be done, I command you that you summon the said B H and A his wife to appear before me, at            on the            day of            next, to shew cause why the said A C ought not to have execution of the debt and costs aforesaid. Given, &c.

☞ An action of debt, at common law, will lie to revive a judgment, as well as a *scire facias*, it will generally be more easy for the magistrate to issue a common warrant, for the amount of the original judgment, and costs, taking care to insert the names of the new parties, plaintiffs, and defendants.

☞ For forms of executions, see titles EXECUTION and WARRANT.

## SEAMEN.

THE congress of the United States having passed a law for the regulation of seamen, we must refer to the *Appendix* (No. 2.) of this work, where the subject will be treated of under "*the duties of a justice of the peace arising under the laws of the United States.*"

If the keeper of a tavern sell any liquor to a sailor in actual pay, on credit, he shall not be entitled to recover the price thereof ; and in any warrant, &c. brought for the same, it shall be dismissed, and the defendant recover double costs. 1 *Rev. Code*, p. 204, sect. 11.

For the above offence of entertaining any sailor without consent of his captain, the ordinary keeper forfeits two dollars to the captain for every offence. *Ibid.* sect. 12.

The master of any vessel putting on shore any disabled seaman or servant, before his contract for service is expired, without providing for his maintenance and cure, forfeits sixty dollars to the overseers of the poor of the county, recoverable by action of debt or information, and moreover, shall be liable to their action for all expences incurred in the maintenance and cure of such person, and shall be ruled to give special bail, on the overseers making affidavit of the cause of action. 1 *Rev. Code*, p. 205, sect. 7.

☞ By an act passed at the session of 1800 (see 1 *Rev. Code*, ch. 284, p. 413 ; and tit. PENITENTIARY, of this work, ch. v.) in consequence of the surrender of Jonathan Robbins, by a magistrate of Virginia, to be tried before a foreign tribunal, magistrates in the sea-port towns had refused to execute the law of congress for apprehending deserters from the merchants' service. To remedy which inconvenience, the following act passed at the session of 1804. See 2 *Rev. Code*, ch. 52, p. 77.



Sect. 1. "If any seaman or mariner, not being a citizen of this commonwealth, or of any of the United States, who shall have signed a contract to perform a voyage on board any merchant ship or vessel (either a ship or vessel of the United States, or of any foreign nation whatsoever) shall at any port or place within this commonwealth desert, or shall absent himself from such ship or vessel, without the leave of the master, or other officer commanding in the absence of the master, it shall be lawful for any justice of the peace of any county or corporation within this commonwealth, upon the complaint of the master of such ship or vessel, or other officer commanding in the absence of the master, to issue his warrant to apprehend such seaman or mariner, and bring him before such justice; and if it shall appear by due proof, that such seaman or mariner has signed a contract as aforesaid, and that the voyage agreed for is not finished, altered, or the contract otherwise dissolved, and that the seaman or mariner has deserted the ship or vessel, or absented himself without leave, the said justice shall commit him to the jail of his county or corporation, there to remain until such ship or vessel shall be ready to proceed on her voyage, or till the master, or other officer commanding in the absence of the master, shall require his discharge, and then to be delivered to such master, or other officer commanding in the absence of the master, he paying all the cost of such commitment. 2 *Rev. Code*, p. 77.

Sect. 2. If any apprentice, who shall have been regularly bound by deed to the master or owner of any ship or vessel as aforesaid, for any term of years, for the purpose of being taught the art, trade, or mystery of a seaman or mariner, shall at any port or place within this commonwealth desert, or absent himself from the ship or vessel, on board of which he hath been placed by his said master, without the leave of the master of such ship or vessel, or other officer commanding in the absence of the master, it shall be lawful for any justice of the peace of any county or corporation within this commonwealth, upon the complaint of the master, or other officer commanding in the absence of the master, to cause such apprentice to be apprehended, and dealt with in the same manner herein before stated, if such justice shall be satisfied, by due proof, that such apprentice hath been regularly bound by deed to the master or owner of such ship or vessel, and that the said deed is then in full force. *Ibid.* 77, 78.

Sect. 3. Provided always, That if any seaman, mariner or apprentice, shall offer sufficient proof to satisfy the justice of the peace before whom he may be brought, that he hath been cruelly or improperly treated while on board any ship or vessel, by the master thereof, or that he hath good cause to apprehend danger to his person from the master, should he be compelled to remain on board such ship or vessel, it shall be lawful for the justice to discharge such seaman, mariner, or apprentice, from all further confinement on account of such desertion or absence. *Ibid.* 78.

(A) *Warrant against a tavern-keeper for selling liquor to a sailor on credit, or entertaining him without leave.*

to wit.

Whereas complaint hath this day been made to me, J P, a justice of the peace of the county (or corporation) aforesaid, by A I, that B O, the keeper of an ordinary or tavern, of the same place, did, on the day of past, and at divers other days and times between that day and the date hereof, sell to C S, a sailor in actual pay, belonging to the ship now lying at the port of a quantity of liquor on credit, to wit, pints of rum, quarts of beer, &c. (or did harbour and entertain, and sell a quantity of liquor to the said C S, without the licence of C D, the captain of the vessel to which the said C S belongs) contrary to the act of the general assembly in that case made and provided. These are therefore to require you to summon the said B O to appear before me, or some other justice of the peace for the county (or corporation) of aforesaid, to answer the said charge. Given, &c.

To constable.

*Judgment.*

On hearing the within complaint, it fully appearing to me that the within B O is guilty of the charge therein specified, judgment is granted against him for two dollars, besides costs.

Costs cents.

For EXECUTION, see title WARRANTS.

(B) *Warrant to apprehend a seaman, deserting from a vessel.*

to wit.

Whereas A C, commander of (describe the vessel by her kind and name, as the ship or sloop &c.) of hath this day made complaint to me, J P, a justice of the peace for the county (or corporation) aforesaid, that B S, who had signed a contract to perform a voyage in the said (ship or sloop &c. as the case may be) hath deserted from the said ship &c. (or hath absented himself from the said ship &c.) without the leave of the said A C. These are therefore to require you to apprehend the said B S, and to bring him before me, or some other justice of the peace of the county (or corporation) aforesaid, to answer the said complaint, and further to be dealt with according to law. Given under my hand and seal, &c.

To constable.

(C) *Commitment.*

To the keeper of the jail of

Whereas B S, a seaman, belonging to the ship of whereof A C is captain, hath this day been brought before me by my

warrant, on a charge of having deserted from the said ship, being under a written contract to perform a voyage in the same, from to ; and it appearing to me, by due proof, that the said B S hath signed such contract as aforesaid, and that the voyage agreed for is not finished, altered, or contract otherwise dissolved; and that the said B S hath deserted the said ship (or absented himself without leave of the said A C, as the case may be.) These are therefore to require you to receive into your jail and custody the body of the said B S, and him therein safely keep, until he be thence discharged by due course of law. Given under my hand and seal, &c.

(D) *Warrant of discharge.*

To the keeper of the jail of

Whereas A C, commander of the ship &c. now ready to proceed on her voyage, hath required the discharge of B S, a seaman, belonging to the said ship, and lately committed to your custody for desertion. These are therefore to require you to discharge from your jail and custody the said B S, and deliver him to the said A C, if he be detained in your custody for no other cause than the desertion aforesaid. And for so doing, this shall be your sufficient warrant. Given under my hand and seal, &c.

☞ The proceedings against an *apprentice* for desertion, or absenting himself without leave, are the same as in case of a seaman or mariner; only taking care to describe him as an *apprentice*, regularly bound by deed, &c.

(E) *Warrant to discharge a seamen, mariner, or apprentice, for cruel treatment by the master.*

to wit.

Whereas B S, a seaman (or *apprentice*, as the case may be) belonging to the ship of hath been brought before me, on a charge of having deserted from the said ship (or of having absented himself without leave of the master of the said ship, as the case may be) and the said B S having now before me produced satisfactory proof, that he hath been cruelly treated while on board the said ship, by the master thereof (or that he hath good cause to apprehend danger to his person, from the master, should he be compelled to remain on board the said ship, as the case may be.) These are therefore, to discharge the said B S from all further confinement, on account of the said charge of desertion (or absence, as the case may be.) Witness my hand and seal, at this day of in the year .

## SEARCH WARRANTS.

THE importance of this subject, as well from the frequent applications made to magistrates to grant those warrants, as from the great caution necessary to be observed in the use of them, will justify my giving them a separate title. Under which I shall shew,

- I. In what manner they shall be granted. II. How they should be executed. III. Proceedings after the return. IV. Form of a search warrant.*

### I. IN WHAT MANNER THEY SHALL BE GRANTED.

The power of granting search warrants seems now to be universally admitted, although so great an authority as lord Coke once denied their legality. See 4 *Inst.* ch. 31, p. 176.

Lord Hale, in his pleas of the crown (vol. ii. p. 150.) after controverting the opinion of lord Coke, as to the power of magistrates in granting those warrants, lays down the following rules respecting the use of them.

1. They are not to be granted without oath made before the justice of a felony committed, and that the party complaining hath probable cause to suspect they are in such a house or place, and doth shew his reasons of such suspicions. 2 *Hale* 150.

And therefore, a general warrant to search in all suspected places is not good, but only to search in such particular places, where the party assigns before the justice his suspicion and the probable cause thereof, for these warrants are judicial acts, and must be granted upon the examination of the fact. *Ibid.*

2. It is fit that such warrants to search do express, that search be made in the day time, and though they may not be unlawful without such restriction, yet they are very inconvenient without it, for many times, under pretence of searches made in the night, robberies and burglaries have been committed, and at best it creates great disturbance. *Ibid.*

3. They ought to be directed to constables and other public officers, whereof the law takes notice, and not to private persons, though it is fit the party complaining should be present and assistant, because he knows his goods. *Ibid.*

It ought to command that the goods found, together with the party in whose custody they are found, be brought before some justice of the

peace, to the end, that upon farther examination of the fact, the goods and party in whose custody they are found, may be disposed as to law shall appertain. 2 *Hale* 150.

## II. HOW THEY SHOULD BE EXECUTED.

1. Whether the stolen goods are in the suspected house or not, the officer and his assistants in the day time may enter, the doors being open, to make search, and it is justifiable by this warrant. *Ibid.* 151.

2. If the door be shut, and upon demand it be refused to be opened by them within, if the stolen goods be in the house, the officer may break open the door. *Ibid.*

3. If the goods be not in the house, yet it seems the officer is excused that breaks open the door to search, because he searched by warrant, and could not know whether the goods were there till search made: but it seems that the party that made the suggestion is punishable in such case; for, as to him, the breaking the door is *in the event* lawful or unlawful, to wit, lawful if the goods are there, unlawful if not there. *Ibid.*

## III. PROCEEDINGS AFTER THE RETURN.

1. With respect to the goods brought before the magistrate, if it appears they are not stolen, they are to be restored to the possessor; if it appears they were stolen, they are to be delivered to the proprietor, but deposited in the hands of the sheriff or constable, to the end the party robbed may proceed by indicting and convicting the offender, to have restitution." *Ibid.*

2. With respect to the party that had the custody of the goods: if they were not stolen, then he is to be discharged; if stolen, but not by him, but by another, that sold or delivered them to him, if it appear that he was ignorant that they were stolen, he may be discharged as an offender, and bound over to give evidence as a witness against him that sold them; if it appears that he was knowing they were stolen, it is fit to bind him over to answer the felony, for there is a probable cause of suspicion, at least that he was accessory *after*. *Ibid.* 152.

The foregoing observations of lord Hale have been fully recognized by very important determinations, made since he wrote. In the case of John Entick, who, with his papers, were seized, by a warrant issued by the earl of Halifax, as secretary of state; "for being the author, or one concerned in writing the Monitor." On trespass, the jurors found a special verdict; and lord Camden, in delivering the resolution of the court, observed, "that a warrant to seize and carry away papers in the case of a seditious libel was illegal and void. He said that warrants to search for stolen goods had crept into the law by imperceptible practice, that it is the only case of the kind to be met with, and that the law proceeds in it with great caution. For, 1st, There must be a full charge, upon oath, of a theft committed."

2d. "The owner must swear that the goods are lodged in such a place."

\* But the writ of restitution is now fallen into disuse, and, instead thereof, the court orders them to be restored to the owner. See 2 *East's Cr. L.* 788.

3d. "He must attend at the execution of the warrant, to shew them to the officer, who must see that they answer the description.

"And lastly, the owner must abide the event at his peril; for if the goods are not found, *he* is a trespasser, and the officer, being an innocent person, will be always a ready and convenient witness against him." 11 *State Trials* 321.

Under this head we must not omit the case of John Wilkes, Esq. in which the doctrine of *general warrants* was fully investigated. On a supposition that Mr. Wilkes was author of No. 45, of a periodical paper, entitled the "North Briton;" lord Halifax, then secretary of state, issued a general warrant for the seizure of Mr. Wilkes's papers. This warrant was executed by a constable and four of the king's messengers, attended by Mr. Wood, private secretary to lord Egremont.

Mr. Wilkes brought an action of trespass against Mr. Wood, who, it was proved on the trial, barely superintended the execution of the warrant. And the question was, whether those general warrants, though supported by precedents ever since the revolution, were *legal*; and if they should be considered *illegal*, whether an action would lie against Mr. Wood. The chief justice Pratt, before whom the cause was tried, told the jury, that if they viewed Mr. Wood as *party* in the affair, they must find a verdict against him; provided they should conceive the warrant illegal; which he himself strongly enforced. The jury, after retiring about half an hour, returned a verdict for *one thousand pounds damages*. See the case at large, with the whole of the evidence, prefixed to *Lofft's Reports*.

#### IV. FORM OF A SEARCH WARRANT.

county, to wit.

Whereas I have received information, upon oath, from A J, that the following property, to wit (*here describe the kind*) has, within days last past, been feloniously taken, stolen, and carried away, out of the possession of the said A J, in the county aforesaid, and that the said A J hath probable cause to suspect, and doth suspect, that the said  
are concealed in (*mention the place in which the party suspects the property is concealed*) of A O, of the said county, labourer. These are therefore, in the name of the commonwealth, to authorise and require you, with necessary and proper assistants, to enter, in the day time, into the (*place suspected*) of the said A O, and there diligently to search for the said                      and if the said                      or any part thereof, shall be found upon such search, that you bring the same, and also the body of the said A O, before me, or some other justice of the peace for this county, to be disposed of and dealt with according to law. Given under my hand and seal, &c.

J P.

To                      constable.

SELF DEFENCE. See HOMICIDE.

SELF MURDER. See HOMICIDE.

## SERVANTS.

PERSONS contemplated by the act of the general assembly, under the denomination of servants, are neither *slaves*, *hirelings* who are citizens of this commonwealth, or *convicts*; the importation of which last, indeed, is expressly prohibited by law: but they are such as were formerly denominated *indented servants*, concerning whom, and *convicts*, many laws have been enacted, which have now become obsolete. See *Hen. Stat. at Large*, vol. i, ii, &c. *Index*, tit. SERVANTS.

As all the acts concerning servants, are now reduced into one, it will be sufficient, under this title, barely to refer to the law, and to give such an abstract of the several sections, as will enable the magistrate to apply the precedents to their proper places.

See *Virginia Laws*, 1 *Rev. Code*, ch. 132, p. 247.

Sect. 1. All white persons, not being citizens of any of the confederated states of America, who shall come into this commonwealth, under contract, to serve another in any trade or occupation, shall be compellable to perform such contract, specifically, during the term thereof, or during so much of the same as shall not exceed seven years. Infants, under the age of fourteen years, brought in under the like contract, entered into with the consent of their father or guardian, shall serve till their age of twenty-one years only, or for such shorter term as the said contract shall have fixed.

Sect. 2. Prescribes the master's duty, in furnishing them in sufficient food, clothing, &c. and giving them a full suit of clothes at the expiration of their service.

Sect. 3. The contract may be assigned, by consent of the servant, in presence of a justice of the peace, attesting the same in writing; and shall pass to executors, administrators, and legatees.

Sect. 4. For disorderly behaviour, &c. a servant may be corrected by stripes, by order of a justice; or refusing to work, may be compelled thereto in like manner, and to serve two days for one lost. Expenses for bringing home a runaway servant shall be compensated by further service, by order of court, after expiration of his time, or security to pay within six months.

Sect. 5. A master failing in the duties prescribed by this act, or guilty of injurious demeanor to his servant, is liable to have the servant discharged by order of court.

Sect. 6. Contracts between master and servant, during service, are void.

Sect. 7. Complaints of servants against masters, and of masters against servants, may be redressed in a summary way, by the court of the county wherein the servant, &c. resides.

Sect. 8. Servants may acquire property. If sick or disabled, shall not be put away by their master, under penalty of thirty dollars, recoverable by the overseers of the poor, to whose action the master shall be also liable.

Sect. 9. White servants, on being purchased by a negro, mulatto, or Indian, shall become free.

Sect. 10. Persons dealing with a servant, without consent of his owner, forfeits four times the value of the thing bought, &c. recoverable by action on the case, and twenty dollars, recoverable by petition; and in default of payment, to receive thirty-nine lashes.

Sect. 11. Where free persons are punishable by fine, servants are punishable by whipping, at the rate of twenty lashes for every eight dollars; but shall not receive more than forty lashes at one time.

Sect. 12. Servants, when free, shall have their freedom recorded, and a certificate thereof from the clerk. If it be lost, the clerk may renew it. Persons entertaining a servant without a certificate shall pay the owner a dollar a day, recoverable by action of debt in any court. A servant making use of a forged certificate shall stand in the pillory two hours on a court day, and make reparation for loss of time, and the person forging shall forfeit thirty dollars, one moiety to the owner of the servant, and the other to the informer, recoverable in any court, and on failure of payment, or security to pay within six months, shall receive thirty-nine lashes.

On a conviction of a servant for hog-stealing, the master is liable to pay eight dollars, to be recompensed by further service. 1 Rev. Code, ch. 98, sect. 3, p. 177.

For penalties on masters of vessels for carrying servants out of the state, see title SLAVES.

*(A) Assignment of a servant's indentures, under sect. 3.*

(After the master makes the assignment, which may be in the usual form, the justice may make the following attestation.)

county, to wit.

I, J P, a justice of the peace for the county aforesaid, do hereby certify, that the above assignment was made in my presence, and in the presence of the within named A S, who did freely consent to the same.

J P.



## SHERIFFS.

THE word *sheriff* is derived from the Saxons, in whose language it signified the reeve or officer of the shire; so called, because on the division of England into counties or shires, the custody whereof was committed to the earl, or *comes*, the business devolved on the sheriff as his deputy; whence he is called, in Latin, *vice-comes*. 1 *Bl. Com.* 339.

☞ Sheriffs were first appointed, in Virginia, in the year 1634 (see *Hen. Stat. at Large*, vol. i, p. 223, 224.) and the country was then divided into counties or shires, as in England. (*Ibid.* p. 224.) Before that period, *marshals* performed the office of sheriffs. *Ibid.* p. 176, 201, 220.

Many parts of the duty of sheriffs having been already noticed, under the several heads to which the subject properly belongs, I shall confine this title to an abstract of the act of assembly, relating to the appointment and duties of sheriffs, and such points of useful information arising under the common law, as it is essential for every sheriff to know.

By *Virginia Laws* (1 *Rev. Code*, ch. 80, p. 120, sect. 1.) the courts of each county, annually, in the month of June or July, shall nominate three persons in the commission of the peace, to the governor, one of which shall be commissioned by the governor, with the advice of council, to act as sheriff in such county.

Sect. 2. Every justice failing to nominate at the time above prescribed forfeits two hundred dollars.

Sect. 3. If a person is appointed sheriff, and fails within two months to enter into sufficient bonds, the clerk of the court, within one month thereafter, shall transmit to the governor a certificate of such failure, and the penalty of three hundred dollars.

Sect. 4. The person first commissioned failing to give bond in two months, or first nominated failing to apply for a commission in one month, the governor, &c. may issue a commission to some other person nominated; and if the person thereafter commissioned or nominated shall be guilty of a like neglect, the governor may commission some other person nominated.

☞ But in these two last cases, the executive may suspend issuing a commission to some other in the nomination, on *good cause shown to the contrary*. See 2 *Rev. Code*, ch. 97, sect. 1, p. 122.

Sect. 5. If a sheriff dies, the vacancy may be supplied by the governor, &c. out of some other in the nomination.

Sect. 6. Every sheriff, commissioned and qualified as above, shall continue in office for one year, and may, with his own consent and the

approbation of the executive, be continued for two years, and no longer;\* unless from some accident a successor shall have been prevented from qualifying, in which case the preceding sheriff shall continue.

Sect. 7. When by the death of any sheriff, another shall be appointed at any other time than in the months of June or July, the governor &c. may continue such successor in office, until the court held in the month of June or July, next after his two years continuance therein, shall expire.

Sect. 8. Every person accepting the commission of sheriff, shall enter into bond with good security in the penalty of thirty thousand dollars, payable to the governor and his successors, for the true and faithful collecting, accounting for, and paying the taxes imposed by law in his county; the bond is to be taken, acknowledged in open court, and recorded; an attested copy is to be transmitted by the clerk to the auditor, which is to be admitted as evidence in any suit, motion, &c. thereon.

Sect. 9. Upon the refusal to act, or disability of any sheriff, the executive may appoint a collector, who shall, as to the collection of taxes, fully represent the sheriff.

And as to all other matters, the coroner shall act during the vacancy of the office of sheriff. 2 Rev. Code, p. 123, sect. 2.

Sect. 10. Every person accepting the commission of sheriff shall likewise enter into another bond, with two good and sufficient securities at the least, in the sum of                      with a condition in the following form, to wit:

The condition of the above obligation is such, that whereas the above bound A B is constituted and appointed sheriff of the county of                      by a commission from the governor, under the seal of the commonwealth, dated the                      day of                      last past, if therefore the said A B shall well and truly collect all levies, and account for and pay the same, in such manner as is by law directed, and also all fines, forfeitures and amercements, accruing or becoming due to the commonwealth in the said county, and shall duly account for and pay the same to the treasurer of this commonwealth for the time being, for the use of the commonwealth, in like manner as is or shall be directed in case of public taxes, and shall in all other things truly and faithfully execute the said office of sheriff, during his continuance therein, then the above obligation to be void, otherwise to remain in full force and virtue.

And shall also enter into one other bond before such court, with the like securities, in the sum of                      with a condition in the following form, to wit:

The condition of the above obligation is such, that whereas the above bound A B is constituted and appointed sheriff of the county of                      by commission from the governor, under the seal of the commonwealth, dated the                      day of                      last past, if therefore the said A B shall well and truly collect and receive all officers' fees and

\* But he must be annually recommended and commissioned, and annually give bond: See 4 Hen. 5<sup>th</sup> Munf. Rep. The Commonwealth v. Fairfax and others.

dues put into his hands to collect, and duly account for and pay the same to the officers to whom such fees are due respectively, at such times as are prescribed and limited by law, and shall well and truly execute, and due return make, of all process and precepts to him directed, and pay and satisfy all sums of money and tobacco by him received by virtue of any such process, to the person or persons to whom the same are due, his or her executors, administrators, or assigns; and in all other things shall truly and faithfully execute and perform the said office of sheriff, during the time of his continuance therein, then the above obligation to be void, otherwise to remain in full force and virtue.

Sect. 11. Which bonds shall be made payable to the governor and his successors, and entered of record in the county court. And in the name of the governor, or his successors, any party injured may prosecute a suit on the last mentioned bond, and recover damages; and which bond shall not become void upon the first recovery, or judgment, against the plaintiff; but may be put in suit at any time by any party injured. *Provided*, that on a verdict for the defendant, he shall recover costs.

Sect. 12. No person to act as deputy sheriff more than two years in any period of four years, unless he satisfies the court that he has collected and accounted for the taxes assigned to him by his former principal.

Sect. 13. Every sheriff, deputy sheriff, or collector, receiving any taxes, fees, county levies or poor rates, shall deliver to the person paying a distinct account, and also a receipt for the same; under the penalty of four dollars, recoverable before a magistrate of his county; and shall also be liable to the party grieved, for receiving more than was really due; to be recovered by action on the case, in which the plaintiff shall recover full costs.

Sect. 14. Every sheriff, or his deputy, shall execute all process, legally issued and directed, within his county, and make due return, under penalty of twenty dollars each failure; one moiety to the governor, for the use of the commonwealth, the other to the party grieved; recoverable, with costs, by action of debt or information in any county court; and shall be liable to the party injured for damages at common law; and for every false return the sheriff shall forfeit sixty dollars, recoverable and to be divided as above.

Sect. 15. No sheriff shall return that the defendant is not found, unless he hath been at his dwelling house or place of abode, and not finding him, shall have left there an attested copy of the writ; and where the defendant is a known inhabitant of another county, the sheriff shall return the truth of the case, but not that the party is not found, and the suit, if issued from a county court, shall abate.

Sect. 16. The persons who may not be arrested may be seen under title ARREST.

Sect. 17. Bonds taken by sheriffs, other than to himself, and dischargeable upon the prisoner's appearance at the day mentioned in the writ, except in special cases directed by law, shall be void.

Sect. 18. Sheriffs shall not take any other or greater fees than those directed by law; all other services shall be done *ex officio*.

Sect. 19. Sheriffs shall collect all taxes, poor rates, &c. and account for them as directed by law.

Sect. 20. No sheriff, &c. shall distrain slaves for taxes, &c. if other sufficient distress can be had, nor take unreasonable distresses, under penalty of being liable to the action of the party injured, grounded upon this act, in which the plaintiff shall recover full costs.

Sect. 21. Sheriffs may impress guards for securing criminals in jail, who shall be paid by the public fifty cents each man *per* day.

Sect. 22. The delivery of prisoners by indenture, between the old sheriff and the new, or the entering upon record in the county court the names of the several prisoners and causes of their commitment, delivered over to the new sheriff, shall be sufficient to discharge the late sheriff from all suits or actions for any escape that shall happen afterwards.

Sect. 23. Sheriff's commission for collecting taxes, &c. and all officers' fees, except clerks and surveyors, shall be five *per centum*.

Sect. 24. No sheriff shall be obliged to go out of his county to pay money levied by execution, or to give notice to creditors, at whose suit any person may be in custody of such sheriff.

Sect. 25. The high sheriff shall have the same remedy and judgment against his deputy and securities, for failing to pay money received by execution, or for an escape, as the creditor has against the high sheriff,

Sect. 26. Deputy sheriffs are to endorse on process, the day they served it, and subscribe their name as well as their principal's to the return, under the penalty of the same forfeiture as for a false return.

Sect. 27. The high sheriff may recover judgment against his deputy, &c. for failing to pay the taxes to be collected by him to the high sheriff or the treasurer, and five *per centum* interest, and five *per centum* damages: *Provided*, that no execution shall issue against the deputy, &c. for the five *per centum* damages, till judgment is obtained against the principal.

Sect. 28. The securities of sheriffs may recover judgment and have execution against the lands of their principals, in the same manner as the commonwealth might.

☞ Deputy sheriffs may complete the collection of the taxes due at the time of the death of their principals. (1 *Rev. Code*, p. 132, sect. 29.) Extended to fines. officers' fees, &c. (2 *Rev. Code*, p. 123, sect. 3.) And high sheriffs and deputies both dying, a collector may be appointed by the court. 1 *Rev. Code*, p. 133, sect. 30, 31. 2 *Rev. Code*, p. 123, sect. 3.

☞ For more relating to the duties of sheriffs, see 1st and 2d vols. *Rev. Code*, *Index* tit. SHERIFFS; all the laws on this subject being too lengthy for insertion.

Of ARRESTS, or executing process, see title ARRESTS.

Of BAIL, see title BAIL.

### (A) *Bail bond, to the sheriff.*

Know all men by these presents, that we, A D, of &c. and B S, of &c. are held and firmly bound to J S, sheriff of the county of

in the sum of                      of lawful money of Virginia, to be paid to the said J S, or his certain attorney, his executors, administrators, or assigns; for the true payment whereof we bind ourselves, our heirs, executors, and administrators, firmly by these presents. Sealed with our seals; dated this                      day of                      in the year

The condition of the above obligation is such, that whereas B P hath sued out of the court of                      a writ of *capias ad respondendum*, against the body of the above bound A D, in an action of                      which writ hath been duly executed; now if the said A D do appear before                      on the                      (*the day to which the writ is returnable*) then and there to answer the said action, then the above obligation to be void, else to remain in full force.

### (B) *Prison-bounds bond, to the sheriff.*

Know all men by these presents, that we, A D, B S, and C S, of                      are held and firmly bound to H S, sheriff of the county of                      and his successors in office, in the full and just sum of                      \* to be paid to the said H S, his successor in office, his or their certain attorney, executors, administrators, or assigns; for the true payment whereof we bind ourselves, jointly and severally, our and each of our heirs, executors, and administrators, firmly by these presents. Sealed with our seals, and dated this                      day of                      in the year

The condition of the above obligation is such, that whereas the above bound A D hath been taken in execution by the said H S, by virtue of a writ of *capias ad satisfaciendum*, issued from the clerk's office of the court of                      to the sheriff of the said county of                      directed; and thereupon the said A D hath taken the benefit of the prison rules, assigned and laid out by the said county of                      Now if the said A D shall not depart, or go out of the rules or bounds of the said prison,† then the above obligation to be void, otherwise to remain in full force.

Signed, sealed and delivered, }  
in the presence of }

☞ This bond must be assigned by the sheriff to the creditor, in the event of the escape of the prisoner. See 1 *Rev. Code*, ch. 79, sect. 2, p. 119.

Of ESCAPES, see title JAIL and JAILOR.

### *Of Executions.*

☞ For the form of a *forth-coming bond*, which has stood the test of the court of appeals, see 2 *Hen. & Munf.* 398.

\* The law says "a reasonable penalty," and the practice has been to take the bond in a penalty double the amount of the debt. See 1 *Rev. Code*, ch. 151, sect. 37, p. 303.

† It has been decided, that if the condition of a prison-bounds bond contain any extraneous matter, or go beyond the tenor of the act of assembly, it is void. See *Syme v. Griffin*, reported in 4 *Hen. & Munf.*

1. *Fieri facias*.... This is an execution against the goods and chattels of a man, as, leases for years, or moveable goods, &c. *Comy. Dig. EXECUTION* (C, 4.)

Goods pawned shall not be taken in execution for the debt of him who pawned them, during the time they are pawned. *Kitchen. 226. Comy. Dig. ut. EXECUTION* (C, 4.)

Nor goods taken and in custody of the sheriff, upon a former execution. *Comy. Dig. EXECUTION* (C, 4.) *Show. 173. 3 Mod. 236.*

Things fixed to the freehold cannot be taken in execution; unless fixed by the defendant himself, as coppers, fats, &c. *Comy. Dig. EXECUTION* (C, 4.) *Bull. N. P. 34. 1 Atk. 477. 3 Atk. 15, 16. 1 Salk. 368.*

Nothing can be taken in execution that cannot be sold; as deeds, writings, &c. *Ca. Temp. Hardw. 58.*

Bank notes, &c. cannot be taken in execution, because they partake of the nature of *choses en action*. *Ibid.*

Money may be taken in execution, if in possession of the defendant. *1 Cranch. 117.*

But money made by the sheriff upon a *fieri facias*, at the suit of A, but not paid over to him, cannot be levied upon by a *fieri facias* against A. In other words, the sheriff cannot retain the money of a plaintiff, made on an execution, on the ground that he has another execution against the same plaintiff, in which he appears in the character of defendant. *Ibid.*

So, money lent to a sheriff and applied to his own use, before he received a writ of *fieri facias* against the lender, is not liable to satisfy such execution. *2 Hen & Munf. 89.*

But if a plaintiff cannot find sufficient effects of the defendant to satisfy his judgment, the court will order the sheriff to retain, for the use of the plaintiff, money which he has levied in another action at the suit of the defendant. *Doug. 231. Armistead v. Philpot, recognised in Turner v. Fendall. 1 Cranch. 117, 135.*

The specific goods of a testator in the hands of his executor cannot be taken in execution, under a judgment against the executor in his own right; if the sheriff have notice that the goods are not the proper goods of the executor. *4 Term Rep. 621.*

But if an executrix use the goods of her testator as her own, and afterwards marry, and then treat them as the goods of her husband, she shall not be allowed to object to their being taken in execution for her husband's debt. *1 Bos. & Pull. 293.*

If two writs of *fi fu.* be delivered to the sheriff on the same day, and he executes the last first, the execution is good, but he is liable to the plaintiff in the first. *1 Salk. 320. 1 Ld. Raym. 251.*

And the sheriff, or officer, is bound to endorse on the execution the day of the month and year when he received it. *1 Rev. Code, p. 297, sect. 11.*

Where two writs of *fieri facias*, against the same defendant, are delivered to a sheriff on different days, and no sale is actually made of the defendant's goods, the first execution must have the priority, even though the seizure were first made under the second execution. *4 Term Rep. 729.*

## SHERIFFS.

After a *feri facias* is delivered to a sheriff, he may enter the  
of the defendant, when the door is open, and seize the goods  
defendant there found. *Comy. Dig. Execution* (C, 5.) 5 Co.  
But he cannot break a house to make execution upon goods or  
*Ibid.* and *Cro. Eliz.* 909. *Moor* 668. *Yelv* 28.

Neither can he open the door, though it be only latched. *C.*  
*Dig. Execution* (C, 5.)  
Or knock, and when the door is a little opened, thrust in with  
*lence. Ibid.* and *Hob.* 62.

But if the house be open, and the sheriff enters, he may afterwards  
break an inner door to take the goods. *Ibid.* and *Palm.* 34.  
So, if the goods of A are conveyed into the house of B, to avoid exe-  
cution, the sheriff, upon a *feri facias* against A, may break the house  
to make execution. *Ibid.* and 5 Co. 93. a.

A sheriff may enter a house after dark, to execute a *feri facias*, if the  
doors be open. 5 Co. 92. *Cro. Jac.* 486.  
But it seems, that if it be the house of a stranger, he ought to aver  
that the goods are there. *Lutw.* 1434.

If A recover in *rot* against two defendants, and levy the execution  
on one only, that one cannot recover a moiety against the other for his  
contribution; although it is otherwise in *assumpsit.* 8 *Term Rep.*  
186.

The sale of goods *bona fide*, by the defendant, pending the action,  
shall be valid; but if done fraudulently, they are liable to the plaintiff's  
execution. See *Cro. Eliz.* 974. *Coke's Reports*, Twyne's case.  
Property of goods is not bound till the delivery of the execution to  
the officer. *Virg. Laws*, 1 *Rev. Code*, p. 297, sect. 11.

If the defendant dies, after the execution is in the hands of the she-  
riff, and before it is served, the execution may be levied on the pro-  
perty in the hands of the executors. *Cro. Eliz.* 181. *Willes* 131.  
7 *Mod.* 251.

If, after seizure of the goods, the defendant regains the possession  
of them, the sheriff may recover them in his own name, in an action  
of *trover.* 2 *Saund.* 47.  
If on a *feri facias* against A, the goods of B are taken, an action of  
trespass will lie against the sheriff. *Kib.* 693. *Doug.* 40.

The sheriff cannot deliver the goods to the plaintiff in satisfaction of  
his debt. *Cro. Eliz.* 504.  
In the case of *Clark v. Withers* (1 *Salk.* 323.) the following points  
were resolved.

- (1) A *feri facias* does not abate by the plaintiff's death, and the  
sheriff may proceed in it; because an execution is an entire thing.
- (2) That the sheriff who begins an execution shall end it, notwith-  
standing his office expires; and a *distingas nuper vice-comitem* lies, of  
which there are two sorts; the one to distrain the old sheriff to sell  
and bring in the money; the other to sell and deliver the money to the  
new sheriff. (3) That by the seizure of goods the property was di-  
vested out of the defendant, and in abeyance, and that the only remedy  
lay against the sheriff.
2. *Capias ad satisfaciendum*.... This writ lies against the body of a  
defendant, and by the common law, the body was to be taken and  
tained in custody till the debt was paid; but by the laws of

(1 *Rev. Code*, p. 301, sect. 29.) the defendant may tender to the officer sufficient personal property in discharge of the debt, which property shall be proceeded upon in the same manner as if it had been taken on a writ of *fi. fa.*

If the plaintiff consent to discharge one of several defendants, taken on a joint *ca. sa.* he cannot afterwards retake him, or take any of the others. 6 *Term Rep.* 525.

So, where the defendant, having been charged in execution at the suit of the plaintiff, was discharged, on his undertaking to pay the debt at a future day; and on non-payment, the plaintiff sued out a *fi. fa.* against him; it was held that the plaintiff received a satisfaction in law, by having his debtor once in custody, and the *fi. fa.* was set aside. 7 *Term. Rep.* 420.

3. *Elegits*.... An *elegit* is a judicial writ, first given by the statute of W. 2. ch. 18. either upon a recovery for debt or damage, or upon a recognizance in any court. By this writ the sheriff shall deliver to the plaintiff *all the chattels of the debtor (except his oxen and beasts of the plough) and the half of his lands*, and this must be done by inquest taken by the sheriff, for the valuation of the goods and lands ought to be first found by the inquisition of a jury. 4 *Rep.* 47. *Comy. Dig. EXECUTION* (C, 14.)

See on the subject of *elegit* generally, 2 *Saund.* (by Wms.) 68. a. note 1.

But if *no lands* be returned, the sheriff need not return an inquisition. 4 *Comy. Dig.* (by Rose) 130. *Stra.* 874.

An inquisition ought to find the lands with certainty; for to find no certain estate will be insufficient. *Comy. Dig. EXECUTION* (C, 14.)

After the inquisition found, the sheriff shall deliver the moiety, but the jury need not divide it. *Cro. Car.* 319.

So, the sheriff ought to deliver the lands, described with certainty; for to say that he delivered a moiety is not sufficient. 1 *Vent.* 259.

See the form of a return to an inquisition, 1 *Rev. Code*, p. 296.

The lands ought to be described by *bounds*; but it seems that it need not by *metes*. *Comy. Dig. EXECUTION* (C, 14.) *Hutt.* 16. 1 *Brownl.* 38. *Dal.* 26. *Doug.* 475.

He ought to deliver a moiety only; for if he delivers more, it will be void for the whole. (1 *Sid.* 91, 239.) And in an ejectment upon it, advantage may be taken of this nullity. 2 *Saund.* (by Wms.) 69. a. note.

The sheriff on an *elegit* is not bound to deliver a moiety of each particular tenement, but only certain tenements and farms, making in value a moiety of the whole. *Doug.* 475.

If the goods are sufficient for the debt, the sheriff ought not to extend the lands. *Comy. Dig. EXECUTION* (C, 14.) 2 *Inst.* 394.

But if the goods are not sufficient, he ought to extend a moiety of all the lands which the defendant had *at the time of the judgment*. (2 *Inst.* 395.) For by the common law, the lands of the defendant were bound by the judgment. (*Comy. Dig. EXECUTION* (D, 1.) *Dyer* 306. b. 1 *Rol.* 892. l. 37. 1 *Inst.* 395.) And the act of assembly of Virginia only says, that no writ of execution shall bind the property of the



goods, but from the time of the delivery to the sheriff, &c. See 1 *Rev. Code*, p. 297, sect. 11.

And if the defendant has aliened the lands after judgment, the sheriff ought to extend a moiety in the hands of the purchaser as well as of the defendant. (2 *Inst.* 396.) Even though the defendant had aliened them *bona fide* before execution sued out. *Comy. Dig. EXECUTION* (D, 1.)

And the judgment has relation back to the first day of the term in which it was rendered. *Ibid.*

The sheriff, under an *elegit*, may either extend a term for years, that is, may deliver a moiety thereof to the plaintiff or connusee, or sell the whole term, as part of the personal estate, to the plaintiff, at a gross price appraised and settled by the jury. 2 *Saund.* (by Wms.) 68. e. f. note.

Reversions on leases for lives or years may be extended, and the plaintiff shall have a moiety of the rent. So, rent charges may be extended, for they issue out of land. *Ibid.* 69. note.

If two have judgment, and one sues out an *elegit*, and has a moiety, and afterwards the other sues an *elegit*, the sheriff shall deliver but a moiety of the residue. *Comy. Dig. EXECUTION* (C, 14.) *Cro. Eliz.* 482.

Yet, if both judgments are of the same term, which is but one day in law, each may take a moiety of the whole. *Comy. Dig. EXECUTION* (C, 14.) *Hardr.* 27.

If the tenant be joint tenant, or tenant in common, it ought to be specially mentioned in the inquisition. 2 *Saund.* (by Wms.) 69. a. note.

4. *Writs of possession*....These writs are the usual process of execution after a recovery in ejectment; in which the sheriff is to deliver full possession of the lands and tenements, according to the command of the writ; the formalities to be observed in which, according to lord Coke, are, to deliver possession of *lands* by a twig and clod given by the sheriff to the plaintiff on the land; where there are *houses*, by delivery of the key of the door; or of *rents*, by corn or grass growing on the land. 6 *Rep.* 52.

If the defendant dies before execution, it may be done against his heir; for, in ejectment, by intendment, the ejector is a disseizor. *Comy. Dig. EXECUTION* (A, 5)

If the plaintiff, in ejectment, declare for forty acres, and recovers only thirty, the sheriff may deliver to him two or three acres in the name of all, without setting them out by metes and bounds, though the plaintiff recovered only a part of what he supposed in the possession of the tenant. *Ibid.*


If on judgment for five-eighths of a cottage, the sheriff delivers possession of the whole, the court will make a rule on the sheriff and lessor of the plaintiff, to restore possession of three-eighths to the tenant. 2 *Comy. Dig.* (by Rose) 113. 3 *Wils.* 49.

The sheriff, upon a *habere facias seisinam, or possessionem*, may break open a house to deliver seisin or possession of it to the demandant, or plaintiff. (*Comy. Dig. EXECUTION* (A, 5.) And may, and ought to, remove all persons in the house. *Ibid.* and 1 *Leon.* 145.

If a *habere facias possessionem* be executed, and before the return and filing the defendant re-enters, a new *habere facias possessionem* shall issue. *Comy. Dig. EXECUTION* (A, 5.)

Until possession completely given, and the officer withdrawn, the execution is not complete; and upon disturbance, an attachment goes. *Ibid.* and 1 *Salk.* 321. 1 *Leon.* 145.

5. *Rescues* ... It seems to be generally agreed, that no action will lie against a sheriff for a rescue on mesne process, for the sheriff cannot always be presumed to have the *posse comitatus* about him; but on execution, it is said, by great authorities, that the sheriff is liable for a rescue. 19 *Vin.* 94. pl. 4.

 For proceedings by sheriffs generally, on executions, as regulated by the laws of Virginia, see 1st and 2d vols. *Rev. Code, Index, tit. EXECUTIONS and SHERIFFS.*

An under-sheriff has implicitly power to execute all ordinary offices of the high-sheriff himself. But where the words of the writ are, *that the sheriff shall go in his own person*, then the under-sheriff cannot do it. *Cro. Eliz.* 10. *Clay's case.* *Hob.* 13.

So, writs of *ad quod damnum* may be executed by the deputy sheriff. 2 *Wash.* 126.

The high-sheriff alone is liable for the official acts of his deputy, unless in those cases where the law provides a special remedy against the latter. 1 *Wash.* 159. 2 *Call.* 273. 3 *Hen. & Munf.* 127.

In all civil causes, as in cases of imprisonment for debt, the sheriff or jailor (at the election of the party) shall be answerable for escapes suffered by the jailor; but if the jailor suffer a *felon* to escape, this, inasmuch as it reacheth to life, is felony only in the jailor; but the sheriff may be indicted, fined, and imprisoned. 1 *Hale*, 597. See *gen. tit. JAIL and JAILOR.*

Every sheriff is a principal conservator of the peace, at the common law. *Haw. B.* 2, c. 8, sect. 4.

## SLAVES.

THE introduction of slavery among us, during our subjection to the government of Great Britain,\* has made it necessary to pass many severe laws for the regulation and restraint of that species, whether we consider them as *men* or as *property*. And though very early in revolution, the further importation of slaves was prohibited, and by several successive acts of the legislature, the condition of those among us greatly ameliorated, yet it has been thought prudent to continue many of the restraints formerly imposed, as will appear by perusing the following acts of assembly.

By *Virginiæ Laws* (1 *Rev. Code*, ch. 103, sect. 1, p. 186) no persons shall henceforth be slaves within this commonwealth, except such as were so on the seventeenth day of October, in the year 1785, and the descendants of the females of them.

Sect. 2. Slaves hereafter brought into this state, and continuing therein a year, or so long at different times as will amount to a year, shall be free. [But now forfeited, and vested in overseers of the poor. 2 *Rev. Code*, ch. 69, sect. 1, p. 95.]

Sect. 3. Persons hereafter importing slaves, contrary to this act, forfeit two hundred dollars each; persons buying or selling such, one hundred dollars each; recoverable by action of debt or information, in any court of record, one half to the informer, the other to the commonwealth. [Penalty increased to four hundred dollars in each case: *Ibid.* p. 97, sect. 8.]

Sect. 4. This prohibition not to extend to any person removing from any of the United States into this state, in order to become a citizen thereof, if within sixty days after his removal he shall take the following oath before some justice of the peace of this commonwealth.

\* As to the precise date when slaves were first introduced into Virginia, historians differ. Beverley, one of the early historians, who is most agreeable in style, but least accurate in point of fact (see *Stat. at Large*, vol. i. notes to pages 513. 526.) says they were introduced in the year 1620 (see *Ber. Hist. Virg.* p. 51. *Burke's Hist. Virg.* vol. 1, p. 211.) Smith, who may be considered the founder of the colony, and was the first historian of Virginia (whose book, now lying before me, was published in 1624) thus expresses himself, in speaking of the events of 1619: "About the last of August came in a Dutch man of warre, that sold us twenty *Negars*" See *Smith's Hist. Virg.* p. 126, under head of "A relation from Muster John Rolfe."

Notwithstanding the laws relating to slaves are now so numerous, they are scarcely noticed in our statute book for many years after their introduction; a collection of all the previous laws respecting servants and slaves may be found in the revision of 1705, ch. 49.

1, A B, do swear, that my removal into the state of Virginia was with no intent of evading the laws for preventing the further importation of slaves, nor have I brought with me any slaves, with an intention of selling them, nor have any of the slaves which I have brought with me been imported from Africa, or any of the West-India islands, since the first day of November, one thousand seven hundred and seventy-eight. So help me God.

Not to extend to persons claiming slaves by descent, marriage, or devise; nor to any citizens of this commonwealth, being now the actual owners of slaves within any of the United States, and removing such hither; nor to travellers and others making a transient stay, and bringing slaves for necessary attendance, and carrying them out again. [But the exceptions in this section not now allowed. See 2 *Rev. Code*, c. 69, sect. 1, p. 95.]\*

Sect. 5. No negro or mulatto shall be a witness, except in pleas of the commonwealth [for or] against negroes or mulattoes, or in civil pleas, where free negroes or mulattoes alone shall be parties. 1 *Rev. Code*, p. 412, sect. 4.

Sect. 6. No slave to go from the tenements of his owner without a pass, or letter, or token, by which it may appear that he is proceeding on his master's business; under pain of being carried before a justice, and by his order receiving correction, or not, at the discretion of such justice.

Sect. 7. A slave found on the plantation of another, without lawful business, may receive ten lashes from the owner or overseer of such plantation.

Sect. 8. Gun, powder, shot, or other weapon, found in possession of a negro or mulatto, may be seized by any person, and on proof before a justice, shall be forfeited to the seizer; (A) and the offender may receive, by order of the justice, any number of lashes, not exceeding thirty-nine.

Sect. 9. Not to extend to free negroes or mulattoes, being house-keepers, who may keep one gun, powder, &c. Nor to other negroes, inhabitants of frontier plantations, who may, by licence (B) from a justice, keep a gun, &c. [But no negro or mulatto can now keep a gun, powder, &c. but by licence from a court. See 2 *Rev. Code*, ch. 83, p. 108.]

Sect. 10. Every person, other than a negro, of whose grand-fathers or grand-mothers, any one is, or shall have been a negro, although all his other progenitors, except that descended from the negro, shall

\* The act passed at the session of 1805 (2 *Rev. Code*, ch. 69, p. 95.) which subjected slaves to forfeiture brought into this state, under any circumstances, was so far amended, at the next session, as not to extend to persons leaving this state, with an intention of returning, or to persons whose lands extend across the boundary line of the state, or who cultivate lands on both sides the boundary line adjoining, or to inhabitants of other states bringing their produce to market through this state.

Several efforts have since been made to restore the former exceptions to the general prohibition, such as persons removing into this state with an intention to reside, and those acquiring slaves in other states, by marriage, descent or devise. Bills to this effect have twice passed the house of delegates, but they have been lost in the senate.

have been white persons, shall be deemed a mulatto; and so every such person, who shall have one-fourth part or more of negro blood, shall in like manner be deemed a mulatto.

Sect. 11. Riots, routs, unlawful assemblies, trespasses, and seditious speeches, by a slave or slaves, shall be punished with stripes, at the discretion of a justice, and any person may apprehend them, and carry them before a justice.

Sect. 12. Person permitting slaves to remain on his plantation four hours at a time, without leave from their master or overseer, forfeits three dollars; permitting more than five negroes so to remain, forfeits one dollar for each negro over that number; the above forfeitures to the use of the informer, recoverable before any justice, &c. (C) (D.)

Sect. 13. Not to extend to negroes belonging to the same person, seated on different plantations, meeting at one of the plantations, with their owners leave; nor their meeting at any public mill, not being in the night, nor on Sunday, with leave of their owner; nor any other lawful occasion, by leave of their owner; nor attending divine service on a Sunday, or other day of public worship. [See acts further declaring what shall be deemed unlawful meetings of slaves. 2 Rev. Code, ch. 35, p. 39. *Ibid.* ch. 47, p. 74.]

Sect. 14. White person, free negro, mulatto, or Indian, found in company with slaves at any unlawful meeting, or harbouring, or entertaining such, without the consent of the owner, forfeits three dollars, recoverable with costs, before a justice (E) to the use of the informer. [Extended to ten dollars, for harbouring; and if a free negro, or mulatto, and unable to pay, may be whipped, not exceeding thirty-nine lashes. 1 Rev. Code, p. 374, sect. 2.]

Sect. 15. Every justice upon his own knowledge, or information, within ten days after such unlawful meeting, shall issue his warrant (E) to apprehend the offenders, &c. Justice failing, forfeits eight dollars; sheriff, or other officer, failing, upon knowledge or information of such meeting, to endeavour to suppress it, and to bring the offenders before some justice, forfeits likewise eight dollars, both penalties recoverable by action of debt in any county or corporation court; and every under-sheriff, sergeant, or constable, who, upon knowledge or information of such meeting, shall fail to perform his duty in suppressing the same, and apprehending the persons so assembled, forfeits four dollars to the informer, recoverable with costs, before any justice, &c. (F)

Sect. 16. Persons dealing with a slave for any commodity whatsoever, without leave of his owner, forfeits four times the value of the article, recoverable by action on the case in any court; also the further sum of twenty dollars, recoverable by summons and petition, &c. or receive thirty-nine lashes, but shall nevertheless pay the costs of such petition. [Additional penalty of ten dollars, for dealing with a slave on a Sunday. (1 Rev. Code, p. 432, sect. 3.) Also, on masters of vessels, for suffering slaves to come on board, or dealing with them, without leave. 1 Rev. Code, p. 432, sect. 1. 2 Rev. Code, ch. 60, sect. 3, p. 84.]

Sect. 17. Negro or mulatto, lifting his hand in opposition to a person other than a negro or mulatto, shall for every such offence, proved by the oath of the party before a justice, receive punishment, not ex-

ceeding thirty lashes; except where such negro or mulatto was wantonly assaulted, and lifted his hand in his own defence.

Sect. 18. Castration of a slave may not be directed, except for an attempt to ravish a white woman.

Sect. 19. Owner not barred of his action, where his slave is killed by any other person, or dies, through the negligence of a surgeon undertaking the dismembering and cure of a slave so dismembered by order of court.

Sect. 20. Any two justices may, by warrant (G) direct the sheriff of the county to take sufficient force and go in search of two or more out-lying slaves, and to apprehend them and carry them to jail.\*

Sect. 21. If any negro or other slave shall consult, advise, or conspire to rebel, or make insurrection, or shall plot or conspire the murder of any person, the same shall be felony without benefit of clergy. [Extended to a free person *conspiring* with a slave. See 1 Rev. Code, p. 374, sect. 1.]

Sect. 22. If any negro or other slave shall prepare, exhibit, or administer any medicine, the offender shall suffer death, without benefit of clergy.

Sect. 23. But if it appear to the court, that such medicine was not exhibited with an ill intent, or attended with ill consequences, he shall be acquitted.

Sect. 24. Nor shall the prohibition extend to a negroe's administering medicine in the family of the owner, or of any other, with the mutual consent of the owner and the person employing him.

Sect. 25. Owner of a slave licensing him to go at large, and trade as a free man, forfeits thirty dollars, recoverable by the overseers of the poor, by action of debt in any court; and the same for every offence.

Sect. 26. Slaves suffered to go at large, and hire themselves out, may be apprehended by any person, and carried before a justice; and if it appears to him that the slave comes within the meaning of this act, he shall order him to the jail of the county (H) there to remain till the next court; who, if it appear to them that the slave comes within the purview of this act, shall order the sheriff to sell him, at the next court, giving twenty days notice thereof, at the court-house door. [A fine, not less than ten nor more than twenty dollars, may be inflicted by a magistrate, or he may commit the slave to jail; and the court may impose a fine, not less than twenty nor more than fifty dollars; or order the slave to be sold. See 2 Rev. Code, ch. 119, p. 147.]

Sect. 27. Twenty-five per cent. on such sale shall be applied by the court, for lessening the county levy; the balance to be paid by the sheriff to the owner, deducting five per cent. for his trouble, and the jailor's fees.

Sect. 28. Persons stealing or selling any free person for a slave,

\* Formerly out-lying slaves might be required, by proclamation from two justices, to return home, and on failure might be lawfully killed. See *Laws Virg.* edit. 1796, p. 261, sect. 21.

knowing the person so sold to be free, shall suffer death, without benefit of clergy.\*

Sect. 29. Stealing any negro or mulatto out of the possession of the owner, or overseer of such slave [or elsewhere found, 1 *Rev. Code*, ch. 244, p. 387.] felony, without benefit of clergy.†

Sect. 30. The justices of every county and corporation shall be justices of *Oyer and Terminer*, for the trial of slaves,‡ which trials shall be by five at least, without juries, upon legal evidence, at such times as the sheriffs or other officers shall appoint, being not less than five nor more than ten days after commitment to prison. No slave shall be condemned, unless all the justices setting shall agree in opinion that the prisoner is guilty, *after allowing him counsel in his defence, whose fee, amounting to five dollars, shall be paid by the owner.* When judgment of death shall be passed, there shall be thirty days at least between sentence and execution, except in cases of conspiracy, insurrection, or rebellion. [But if the called court fail to meet on the day, the proceedings and trial adjourned to the next court, in course. 1 *Rev. Code*, ch. 264, sect. 2, p. 402. See PENITENTIARY, ch. ii.]

Sect. 31. The value of a slave condemned, who shall suffer accordingly,§ or die before execution, to be ascertained by the justices triers, shall be paid by the public to the owner. One detained in slavery, who has commenced an action to recover his freedom, shall be prosecuted as a free man.

\* But this offence, not being enumerated in the penitentiary law, is now punishable by confinement, for a period not less than one nor more than ten years. See PENITENTIARY, ch. ii.

† By act of 1798 (1 *Rev. Code*, ch. 244, p. 387) the offence of stealing a slave is punishable by confinement in the penitentiary, not less than three nor more than eight years.

‡ The first act ever passed in Virginia, for the trial of slaves committing capital crimes, was in 1692, *seventy-two* years after their introduction into this country. This act directed, that slaves guilty of crimes punishable, by the laws of England, with death, or loss of member, should be tried by a court of *Oyer and Terminer*, to be constituted by the governor for each special occasion.

The same law provided against slaves holding property in horses, cattle, and hogs; and vested all such then held by slaves in the overseers of the poor, if the owner of the slave did not appropriate them to his own use by a certain period. It also made the owner of a plantation or quarter, where there was no white overseer, liable for all the depredations committed by his slaves.

From the impossibility of a slave's exercising a right of ownership over horses, thus expressly declared by the legislature, has probably arisen the generally received opinion, that slaves could not be convicted for horse-stealing. Another reason may be, that horse-stealing, as to the capital punishment, was declared by acts of parliament of England (1 *Edw. VI.* c. 12. 2 and 3 *Edw. VI.* ch. 33. 37 *Hen. 8.* c. 8. 31 *Eliz. c.* 12.) which could not be contemplated as affecting slaves. It was not until the year 1789, that horse-stealing was made punishable with death, by an express law of Virginia (see 1 *Rev. Code*, ch. 47, sect. 1, p. 45.) though it had been uniformly so punished, under the above acts of parliament, the substance of which was enacted in the revival of 1792 (see 1 *Rev. Code*, ch. 101, p. 179.) Laws of Virginia very early passed against *receivers* of stolen horses; and against *slaves* and others, for hog-stealing.

§ Slaves condemned to be hanged may be reprieved by the executive, to be transported out of the United States. On the conviction of a slave, the clerk is to transmit a copy of the proceedings and the whole of the evidence to the executive. 1 *Rev. Code*, ch. 388, p. 431.

Sect. 32. No person, having interest in a slave, shall sit upon the trial of such slave

Sect. 33. On the trial of a slave, the court may take for evidence the confession of the offender, the oath of one or more credible witnesses, or such testimony of negroes or mulattoes, bond or free, with pregnant circumstances, as to them shall seem convincing.

Sect. 34. In cases within the benefit of clergy, negroes or mulattoes shall not have judgment of death ; but shall be burnt in the hand, *with such other corporal punishment*, as the court shall think fit to inflict ; except the party had once had the benefit of this act, and then he shall suffer death.

Sect. 35. Negroes or mulattoes, being convicted by due proof of giving false testimony, shall, without further trial, be ordered by the court to have one ear nailed to the pillory, and there to stand for one hour, and the ear to be cut off, and the other ear in like manner ; and shall receive thirty-nine lashes, or such other punishment as the court shall think fit, not extending to life or limb ; and at every trial of slaves for capital offences, the person first named in the commission then sitting shall, before the examination of any negro or mulatto, *not being a christian*, charge such evidence to declare the truth ; which charge shall be in the words following, to wit :

You are brought hither as a witness, and by the direction of the law I am to tell you, before you give your evidence, that you must tell the truth, the whole truth, and nothing but the truth ; and that if it be found hereafter that you tell a lie, and give false testimony in this matter, you must, for so doing, have both your ears nailed to the pillory, and cut off, and receive thirty-nine lashes on your bare back, well laid on, at the common whipping post.

Sect. 36. Any person by last will and testament, or by instrument in writing, under hand and seal, attested and proved in court, by two witnesses, or acknowledged by the party, may emancipate and set free his slaves, who shall thereby enjoy perfect freedom. [But slaves now emancipated, forfeit their right to freedom, if they remain twelve months in Virginia after the right accrues. 2 Rev. Code, ch. 69, sect. 10, p. 97.]

Sect. 37. But they may be taken in execution to satisfy any debt due by the person emancipating, before such emancipation. [See section 36.]

Sect. 38. All slaves so set free, and in the judgment of the court not sound in mind and body, being above the age of forty-five years, or males under twenty-one, or females under eighteen, shall be supported by the person so liberating, or out of his estate ; and upon neglect or refusal, the court of the county, or corporation, where the neglect shall be, shall, upon application, order the sheriff to distrain, and sell so much of the person's estate as shall be sufficient for that purpose. [See section 36.]

Sect. 39. Persons in their life time, or executors of those deceased, by whom any slave shall be emancipated, shall deliver to such slave a copy of the instrument of emancipation, attested by the clerk of the court of the county or corporation, who shall be paid by the person emancipating eighty-three cents. Every person neglecting to give such copy, forfeits thirty dollars, recoverable with costs in any court



of record, one half to the person suing, and the other to the person liberated. [See section 36.]

Sect. 40. Any justice may commit to the jail of his county (*I*) any emancipated slave, travelling out of his county without such copy, there to remain till such copy is produced, and the jailor's fees paid. [See section 36.]

Sect. 41. Slaves so liberated, and neglecting to pay their taxes and levies, may be, by order of the court, hired out by the sheriff, till such taxes are paid. [See section 36.]

Sect. 42. Saving to all persons, &c. other than those emancipating, all right, &c. to such slaves.

Sect. 43. All negroes and mulattoes, in all courts of judicature within this commonwealth, shall be held, taken, and adjudged, to be personal estate. [But not to be sold as *perishable* estate. See 1 *Rev. Code*, ch. 170, sect. 2, p. 320.]

Sect. 44. A widow possessed of slaves, as of the dower of her husband, and removing, or voluntarily permitting them to be carried out of this commonwealth, without the consent of him or her in reversion, forfeits to the reversioner all such slaves, and all other dower of her husband's estate.

Sect. 45. The same law of the husband of a widow, in like cases, who forfeits to the person in reversion during the husband's life. [Dower slaves, and those held for life, to be registered. See 2 *Rev. Code*, p. 36, 77.]

Sect. 46. A slave or slaves, descending from an intestate, where an equal division cannot be made in kind, may, by direction of the high court of chancery, or of the county or corporation where administration was granted, be sold, and distribution of the money be made. Provided that each claimant shall be summoned to shew cause against such sale.

Sect. 47. No gift of any slave shall be good, unless the same be made by will, duly proved and recorded, or by deed in writing, to be proved by two witnesses at least, in the district court, or court of the county or corporation, where one of the parties lives, within eight months after the date of such deed.

Sect. 48. This act shall be construed to extend only to such gifts where the donors have, notwithstanding such gifts, remained in the possession, and not to gifts of such slaves as have at any time come into the actual possession of, and have remained with the donee, or some person claiming under such donee.

Sect. 49. This act is not to alter any adjudication heretofore made, nor to affect the interest of any *bona fide* purchaser, for a valuable consideration, or creditor of the donor, before the donee hath been at least three years in possession of the slave or slaves, under such gift, nor in any manner to restrain the operation of the act of limitation. [See 3 *Hen. & Munf.* 127.]

Sect. 50. The master of a vessel, carrying out of this state a servant or slave, without the consent of the owner, forfeits one hundred and fifty dollars for every servant, and three hundred dollars for every slave; one moiety to the commonwealth, and the other to the owner, recoverable by action of debt or information in any court; and, moreover, shall be liable to the suit of the party grieved, at common

law, for damages. [Additional penalties. 1 *Rev. Code*, ch. 222, sect. 6, 7, p. 374. 2 *Rev. Code*, ch. 60, p. 84.]

Sect. 51. In any action against such master, under this act, he may be ruled to special bail, and shall not be allowed to plead in bar, or give in evidence any act of limitation.

Act of 1793, 1 *Rev. Code*, ch. 163, p. 315.

Sect. 2. All free negroes and mulattoes, residing in *towns*, to be registered and numbered, in a book to be kept by the clerk; which register shall specify the age, name, colour and stature, by whom and in what court emancipated, or whether born free. A copy of the register, signed by the clerk and attested by one alderman, to be annually delivered to the negro or mulatto, by the clerk, at a fee of twenty-five cents. [In like manner, free negroes and mulattoes in *counties* are to be registered. See 2 *Rev. Code*, ch. 14, p. 11.]

Sect. 3. The penalty for employing a negro or mulatto, without such certified copy, is five dollars for each offence, recoverable by warrant before a magistrate. (1, 2.)

Sect. 4. If any negro or mulatto, residing in a *town*, neglect to procure such certificate, he may be committed to jail by any alderman or magistrate, till such copy is produced and the jailor's fees paid. (1, 3.)

Sect. 5. Free negroes and mulattoes are not to go at large in *counties*, without having their certificate registered in the clerk's office where they reside; and a certified copy by the clerk, for which he shall receive twenty-five cents.

Sect. 6. Any person employing a negro or mulatto, within the per-view of this act, forfeits five dollars, recoverable before a justice. (1, 2.)

Sect. 7. Such certificates to be renewed every three years, under the same regulations as prescribed in obtaining the first.

Sect. 8. A negro or mulatto, residing in a *county*, neglecting to procure such certificate, to be dealt with as directed in section four, with respect to those in towns. (1, 3.)

Act of 1793, 1 *Rev. Code*, ch. 164, p. 316.

Sect. 1. No free negro or mulatto shall migrate into this commonwealth, and such as do come, contrary to this act, may be apprehended by any citizen, and carried before a justice of the county where he is taken; which justice is authorised to examine, send, and remove every such out of this commonwealth, into that state or island from whence he came; and for this purpose the sheriff or other officer, and other persons, may be employed by the justice, in the same manner as for the removal of criminals from one county to another (*M.*) And every free negro or mulatto, imported into this state by water, shall be exported to the place from whence he came, at the charge of the importer; recoverable on motion, in the name of the commonwealth, on ten days notice in any court.

Sect. 2. The penalty for bringing any free negro or mulatto into this commonwealth is one hundred pounds each; one half to the commonwealth, and the other to the informer, recoverable in any court, and the defendant shall be ruled to give special bail.

Sect. 3. Not to extend to masters of vessels bringing a free negro or mulatto into this state, employed on board a vessel, who shall depart

therewith, nor to any person travelling into this state, with any such free negro or mulatto as a servant.

Sect. 4. If any slave shall be brought or come into this state from Africa or the West India islands, directly or indirectly, it shall be the duty of a justice to cause such slave to be apprehended (*N*) immediately, and transported out of this commonwealth, and the expence attending the same shall be paid by the person importing such slave, recoverable in the name of the justice directing such slave to be transported, by warrant (*O*) before a single magistrate. [Amended by act of 1800 (1 *Rev. Code*, ch. 283, sect. 4, p. 412, 413.) and the executive authorised to remove them.]

Act of 1795, 1 *Rev. Code*, ch. 189, p. 346.

Sect. 1. A person conceiving himself or herself entitled to freedom, and detained in slavery, may make application to a magistrate out of court, or to the court of the circuit, county, or corporation, where he or she resides; if the complaint be made to a magistrate, he shall summon the possessor to appear before him, or some other magistrate of the county (*P*) to answer the complaint; and shall compel him to give bond with security (*Q*) equal at least to the value of the complainant; conditioned to suffer him or her to appear at the next court for the circuit, county, or corporation, to petition the court for leave to sue in *forma pauperis*, for the recovery of his freedom; and if the possessor fails, or refuses to give such bond, the magistrate shall order the complainant into the custody of the officer serving the warrant (*R*) there to be safely kept, at the expence of the holder, till the next court, where the complainant must be produced.

Sect. 2. When a petition shall be offered to a court, it must state the material facts, which being proved by affidavit, or otherwise, the court shall assign counsel to the petitioners who shall prosecute without fee; but before process shall issue, the counsel shall make an exact statement of the circumstances, with his opinion; and unless the court shall see manifest reason to deny their interference, they shall order the clerk to issue process against the owner, to appear and answer the complaint, and in the mean time, that the complainant be in the custody of the sheriff, till the owner shall give bond and security, either in court, or with the clerk, to have the complainant forth-coming to answer the judgment of the court; in which case the complainant shall be returned to the owner.

Sect. 3. A person aiding, abetting, or maintaining another in a prosecution for freedom, who fails to establish it, forfeits one hundred dollars, recoverable by action of debt or information; and is moreover liable in an action on the case for damages.

Sect. 4. The dower of a widow not affected by her husband's emancipating his slaves by will; if part only be emancipated, she shall take her dower out of the other part, if equal to a third of the whole number. In all such cases the dower is recoverable by bill in chancery against the executor, and the third of the slaves to be determined by casting lot; *provided*, that if the personal estate of the husband, after payment of his debts, be sufficient to compensate the widow for a third of the slaves, the executor shall pay her a sum equal to such third part of the slaves; to be ascertained by persons appointed by the court.

Sect. 5. To make, forge, or counterfeit, or cause it to be done, or willingly to act or assist in making, forging, or counterfeiting any writing, whereby the slave or servant of another, without the consent of the owner, shall be declared to be emancipated, or suffered to go at large, and pass as free, subjects the offender to a penalty of two hundred dollars, and one year's imprisonment, without bail or main-prise.

Act of 1796, 1 *Rev. Code*, ch. 206, p. 364.

Sect. 1. This law authorised overseers of slaves, within this state, who might carry them out, and had not sold or hired them out, to bring them back, without incurring any penalty; *provided*, that it should not affect any right to freedom which such slave might acquire, by the laws of the state to which he had been carried. [But see act of 1805 (2 *Rev. Code*, ch. 69, p. 95, amended by ch. 99, of 2 *Rev. Code*, p. 125) by which such permission would not now be given, except under certain circumstances.]

Act of 1797, 1 *Rev. Code*, ch. 222, p. 374.

Sect. 1. Every free person, advising or conspiring with a slave, to rebel, or make insurrection, or advising or assisting a slave to murder any person, shall suffer death. [But see PENITENTIARY, ch. ii. as to the cases not clergyable, and which are omitted in the penitentiary law.]

Sect. 2. All free persons, convicted before a magistrate, of harbouring or entertaining a slave, without consent of the owner, forfeits immediately to the informer ten dollars (\$ ) and in case of non-payment, to be required by the magistrate before whom brought, to give bond and security (\$ s ) for his appearance at the next court for the county or corporation, and to be of good behaviour in the mean time, or to stand committed till the same be performed. (T). If the offender be a free negro or mulatto, and be unable to pay, then to receive not exceeding thirty-nine lashes, at the discretion of the magistrate.

Sect. 3. No person, a member of an abolition society, shall be a juror in the trial of a suit for freedom. Every such suit shall be tried at the next quarterly or circuit court, succeeding the petition or suit, unless the evidence could not so soon be obtained.

Sect. 4. A slave escaping after condemnation, and before execution, may, on being retaken, be identified by a court, summoned by the sheriff, in the same manner as for his trial: (U) and upon such identity, may carry the former sentence into effect, by ordering the execution at a future day.

Sect. 5. Any free negro or mulatto, delivering a copy of his registry of freedom to a slave, shall be adjudged a felon.

Sect. 6. No master of a vessel shall transport, or attempt to transport any slave out of this state, until he shall have produced him before some magistrate of a county, adjoining the river where his vessel lies, and lodged with the magistrate a description of the name, probable age, and alledged place of birth of the negro or mulatto, and a declaration of the port to which the vessel is bound; and until he shall have produced to the magistrate, the certificate of freedom granted the said negro or mulatto, by the clerk of the court where he was registered, or the written direction of the owner of the negro or mulatto, com-

manding, or permitting, the skipper to carry him out of the state. A certificate of all which shall be granted by the magistrate. (V).

Act of 1798, 1 *Rev. Code*, ch. 244, p. 387.

Sect. 1. Stealing a negro or mulatto slave, whether from the actual possession of the owner, or overseer, or elsewhere, subjects the offender to imprisonment in the penitentiary, for a period not less than three nor more than eight years.

Act of 1800, 1 *Rev. Code*, ch. 274, p. 407.

Sect. 1. Slaves under sentence of death, for conspiracy, insurrection, or other crimes, may be sold by the executive for transportation out of the United States. If any slave, so sold, shall return, he shall be apprehended and executed under the former sentence. (W). On the conviction of a slave, for a crime which affects life, the evidence for and against him, shall, by order of the court, be taken down, which, together with the whole proceedings, shall be immediately transmitted to the executive.

Sect. 2. The owners of slaves so sold or transported to be paid in the same manner as for slaves executed. [And to be paid as soon as the executive shall determine to sell and transport. 1 *Rev. Code*, ch. 288, p. 421.]

Act of 1800, 1 *Rev. Code*, ch. 283, p. 412, amended by act of 1807, 2 *Rev. Code*, ch. 119, p. 147.

Sect. 1. If any person shall permit his own, or a slave hired by him, to go at large, and hire himself out, any person may, and it is the duty of every sheriff, deputy sheriff, coroner, and constable, to apprehend and carry such slave before a magistrate (Ww) who shall forthwith impose on the offender a fine, not less than ten nor more than twenty dollars; or may order the slave to jail (X) there to be kept till the next court, by which either a fine may be imposed on the offender, not less than twenty nor more than fifty dollars, or the sheriff or other officer may be ordered to sell such slave. And in every case of a fine, under this act, the slave may be held in custody, and sold to satisfy the same, and all incidental charges, either by order of the magistrate or court, unless it be paid within ten days after imposed; (Y) which fines shall be for the benefit of the poor. *Provided*, that no sale shall convey a greater interest than held by the person incurring the fine, unless it shall appear that the owner of a slave was privy to or connived at the breach of this act.

Sect. 2, of 1 *Rev. Code*, ch. 283, p. 412. A trustee, guardian, executor, or administrator, suffering a slave, held by them as such, to hire himself out, forfeits forty dollars for every offence, recoverable, by any person who will sue, by action of debt or information, in any court.

Sect. 3. One third of the amount of sale shall be applied by the court, ordering it towards lessening the county levy, and the residue applied by the sheriff, after deducting six per cent. on the whole, for his trouble and the jailor's fees, to the person informing and establishing the fact; and, if no informer, then after the above deductions, the whole to go towards the levy.

Sect. 4. Any negro or mulatto, bond or free, is a good witness, in pleas of the commonwealth, for or against negroes or mulattoes, bond

or free, or in civil suits, where free negroes or mulattoes shall alone be parties.

If any slave shall be brought or come into this state, from any place without its limits, any magistrate of the county or corporation where he is found shall cause him to be apprehended and brought before him (*Z*) or some other magistrate, who shall, upon satisfactory evidence, commit him to jail. (*Aa*). And the magistrate so committing shall immediately give notice to the executive, who shall pursue such measures for transporting the slave out of the state, as they shall think proper. The expences shall be paid by the person importing or holding the slave, recoverable in the name of the governor, by motion or suit, in which the offender shall be held to bail.

[NOTE....By act of 1805 (2 *Rev. Code*, ch. 69, p. 95, sect. 1.) slaves thereafter imported are forfeited, if they remain twelve months in the state; but by the thirteenth section, the power of the executive to send them out of the state is not abridged.]

Sect. 5. Commissioners of the revenue are bound annually to return, with a list of taxable property, a complete list of all free negroes or mulattoes, with their names, sex, places of abode, and particular trades or occupations; a copy of which list is to be fixed by the clerk at the court-house door, and the original deposited in his office. Every commissioner or clerk, failing in said duty, forfeits twenty dollars, recoverable by motion or information; one half to the use of the county, the other to the prosecutor.

Sect. 6. Any negro or mulatto, so registered, removing into another county, may be apprehended by warrant from a magistrate (*Bb*); and if he has no honest employment to maintain himself, may be treated as a vagrant.

Sect. 7. This act to be given in charge to the grand jury, in all courts of law.

Act of 1801, 1 *Rev. Code*, ch. 305, p. 432.

Sect. 1. Any master or skipper of a vessel, who shall permit a slave to come on board, or shall buy, sell, or receive of, to, or from a slave, any commodity, without leave given in writing by the master or overseer, forfeits, in addition to former penalties (see 1 *Rev. Code*, ch. 103, *ant.* sect. 16.) the sum of twenty dollars, recoverable by warrant from a magistrate, by any prosecutor; upon service of which warrant the offender shall be taken, and remain in custody till judgment (*Cc*); and, on conviction, shall be committed by the magistrate to jail, there to remain till payment of the penalty. (*Dd*). But if the skipper be a slave, he shall receive, by order of the magistrate, thirty-nine lashes, on his bare back. [An additional penalty of two hundred dollars inflicted for the above offence, by act of 1804, ch. 60, sect. 3, p. 84; one third to the owner of the slave, one third to the informer, and one third to the overseers of the poor.]

Sect. 2. In an action on the case against the skipper of a vessel, for dealing with a slave, under the sixteenth section of the act of 1792 (1 *Rev. Code*, ch. 103, p. 188.) the defendant shall be ruled to appearance bail, on affidavit before a magistrate of the cause of action, to be transmitted to the clerk of the court.

Sect. 5. Any person, who, on the sabbath day, shall buy of, sell to, or receive from a slave, any commodity, without the leave of the master or overseer given in writing; or, for the like, with a free negro or mulatto, shall, in addition to former penalties, pay ten dollars, recoverable by warrant before a magistrate, by any prosecutor. (*E c*).

Act of 1802, 2 *Rev. Code*, ch. 14, p. 11.

Sect. 1. Every free negro or mulatto, residing in any county, shall be registered and numbered in a book to be kept for that purpose, by the clerk, which register shall specify the age, name, colour and stature, together with any apparent mark or scar, on the face, head, or hands, and in what court emancipated, or whether born free. A copy of the register, signed by the clerk and attested by one justice, is to be delivered to such negro or mulatto, by the clerk, at a fee of twenty-five cents.

Sect. 2. But the clerk shall in no case grant a copy of such register, until the court of the county where the free negro or mulatto resides shall have certified that it has been truly made.

Act of 1803, 2 *Rev. Code*, ch. 33, p. 36; amended by act of 1804, 2 *Rev. Code*, ch. 51, p. 77.

Sect. 1. In all cases where any slaves [*hath been*, by 2 *Rev. Code*, ch. 51, p. 77, sect. 1, or] shall be allotted to any widow for her dower, or devised to her in lieu thereof, or held by any person for his own life or the life of another, the person entitled to the life estate, or the guardian, if he or she be an infant, shall, within sixty days after coming to possession, lodge with the clerk of the county, wherein he or she resides, a list, containing the names, ages, and sexes of the slaves, under the penalty of fifty dollars for each slave: the clerk shall record the list in a well bound book, for which he shall receive from the person furnishing it a fee of one dollar: the increase of such slaves shall in like manner, and in like time from their births, be recorded and registered, at a fee of twenty-five cents each. If the widow marry again, her husband shall perform the duties required of her by this act.

Sect. 2, of 2 *Rev. Code*, ch. 33, p. 11. The penalties incurred by this act, shall go to the party aggrieved, recoverable by action of debt, bill, plaint or otherwise, in any court of record.

Act of 1803, 2 *Rev. Code*, ch. 35, p. 39; amended by ch. 47, of 2 *Rev. Code*, p. 74.

Sect. 1. All meetings or assemblages of slaves at any meeting-house, or other place, *in the night*, under whatever pretext, deemed an unlawful assembly; and any justice of the county or corporation may, either from his own knowledge or information thereof, issue his warrant, directed to any sworn officer or officers (*Ff*) authorising him or them to enter the house or houses, where such meetings are held, for the purpose of apprehending or dispersing such slaves, and to inflict corporal punishment on the offenders, at the discretion of the justices, not exceeding twenty lashes. [But nothing in this act shall be construed to prevent the master or owner of slaves from carrying or permitting them to go with him, or any part of his white family, to any place of religious worship; *provided* it be conducted by a regularly or-

dained or licensed white minister. (2 *Rev. Code*, ch. 47, sect. 1, p. 74. *Ibid.* sect. 2.) Nor in any manner affecting white persons, who may happen to be present at any meeting or assemblage, for the purpose of religious worship, so conducted by a white minister, at which there shall be such a number of slaves, as would, as the law has heretofore been construed, constitute an unlawful assembly of slaves.]

Sect. 2, of 2 *Rev. Code*, ch. 35, p. 39. The said officer or officers shall have power to summon any person to aid and assist in the execution of any warrant, directed to him or them for the above purpose, who, on refusal, shall be subject to a fine at the discretion of the justice, not exceeding ten dollars (*G*g). *Provided*, that this act shall not extend to any county west of the Blue Ridge.

Act of 1804, 2 *Rev. Code*, ch. 60, p. 84.

Sect. 1. Whoever shall carry, or cause to be carried, any slave out of this state, or from one county to another, within the same, without the consent of the owner, or the guardian (if he be a minor) and with intent to defraud or deprive the owner of such slave, shall be guilty of a misdemeanor, and, on conviction, be fined not less than one hundred nor more than five hundred dollars; and be imprisoned in the penitentiary, not less than two nor more than four years, which fine and imprisonment to be ascertained by a jury: and also, the offender shall pay the owner double the value of the slave, and double the amount of the expences in regaining or attempting to regain him, recoverable by action on the case, in any court having original jurisdiction over such actions: and in all suits for the recovery of a penalty, under this act, the defendant may be held to bail as of right.

Sect. 2. And to determine what shall be deemed a carrying away, not only those who shall willingly and designedly carry away slaves as aforesaid, but all masters of vessels, who, having a slave on board, shall sail beyond the limits of any county with him, shall be considered as carrying off or removing him. And any person travelling by land, who shall give countenance, protection, or assistance to such slave, to prevent his being stopped or apprehended, shall also be deemed guilty of carrying off such slave.

Sect. 3. Inflicts an additional penalty of two hundred dollars on a master or skipper of a vessel, for permitting a slave to come on board, or dealing with him, without leave of the owner. [See *ant.* act of 1801, 1 *Rev. Code*, ch. 305, p. 432, sect. 1.]

Sect. 4. In any action against the master or skipper of a vessel, under this act, the defendant may be held to bail.

Sect. 5. Overseers of the poor, hereafter binding out black or mulatto orphans, shall not require that they be taught reading, writing, or arithmetic,

Act of 1805, 2 *Rev. Code*, ch. 69, p. 95.

Sect. 1. Slaves brought into this state, and either kept therein a whole year, or so long at different times as amounts to a year, or sold or hired therein, are forfeited, and vested in the overseer of the poor, who apprehends or attempts to apprehend them, in trust, for the benefit of the poor of the county or corporation. [Not to extend to inhabitants of the state leaving it, *with intention to return*, and carrying with him his slave or slaves (2 *Rev. Code*, ch. 99, sect. 1, p. 125.) nor



to cases where an inhabitant owns land extending across the boundary line of the state, who may employ his slave on both sides; but no slave owned in another state, and so to be employed in this state, shall be sold, or otherwise employed therein (*Ibid.* sect. 2.) nor to persons, inhabitants of another state, conveying their produce to market through this state, or having travelling servants with them. *Ibid.* sect. 3.]

Sect. 2. Upon complaint of an overseer of the poor to a magistrate, he shall issue his warrant, directed to any officer of the county, to bring the slave before him or some other magistrate, and moreover summon the holder to appear and answer it. (*H h*).

Sect. 3. The magistrate, before whom the slave is brought, may, upon the evidence, either dismiss the prosecutor, or require the owner or holder to enter into a recognizance (*I i*) payable to the governor, and his successors, in a penalty of double the value of the slave, conditioned to appear at the next court, and perform its order; which recognizance, with the warrant, shall be forthwith returned to the clerk.

Sect. 4. If the owner or holder be not in the county, or fail to appear, being summoned, or be unable or refuse to give security, the magistrate shall cause the slave to be delivered to the sheriff or sergeant, to be safely kept, so that he may be brought before the next court. (*J j*).

Sect. 5. On the appearance of the party at court, or if he fails to appear, the court to which he was recognized shall immediately cause a jury to be impannelled, to try the facts without the formality of pleading, unless good cause be shewn for a continuance; and if the jury find that the slave has been brought, and remained in this state contrary to law, the court shall order him to be delivered to the overseers of the poor, to be sold.

Sect. 6. If the owner or holder of the slave be not in the county, or shall not have been summoned, the court shall make an order, requiring him to appear at some court day, to be specified in the order; which order shall be published at the front door of the court-house, for two successive court days, and in some newspaper printed in this state, four times successively. And the court to which he is so directed to appear shall impanel a jury, and proceed in all things as directed in section five.

Sect. 7. The nett proceeds of sale, after deducting ten per cent. for the overseers of the poor, who commenced the prosecution, and the costs, shall go towards lessening the poor rates.

Sect. 8. The penalty for bringing in a slave, contrary to this act, or for selling, buying, or hiring such, knowingly, is four hundred dollars each; recoverable by action of debt or information, to the use of the commonwealth; in which action the defendant shall be ruled to special bail; judgment shall be rendered without regard to form; and a lawyer's fee of twenty dollars taxed.

Sect. 9. A slave brought into this state contrary to law, or passing through the same, and committing a capital offence therein, for which he shall be executed, shall neither be valued by the court, nor paid for by the public. Nor shall any slave be paid for, who shall be executed for a crime, in the perpetration of which the owner shall be adjudged either a principal or accessory, and thereof convicted.

Sect. 10. An emancipated slave, remaining in this state more than twelve months after the right to freedom accrues, forfeits such right, and may be apprehended and sold by the overseers of the poor, when found, for the benefit of the poor.

Sect. 11. Overseers of the poor must take the following *additional* oath: "I, A B, do swear, that I will faithfully enforce the laws to prevent the importation of slaves."

Sect. 12. If, in any action or prosecution by the overseers of the poor, by virtue of this act, they be cast, they shall not pay costs; but they shall be paid out of the county levy.

Sect. 13. Nothing in this act shall abridge the right of the executive to remove slaves brought into this state (see *ant.* 1 *Rev. Code*, ch. 283, sect. 4, p. 412.) nor to repeal an act, authorising the removal of slaves from the county of Alexandria, in the district of Columbia.

Sect. 15. This act to be given in charge to every grand jury.

Act of 1805, 2 *Rev. Code*, ch. 83, p. 108.

Sect. 1. No free negro or mulatto shall keep or carry a fire-lock of any kind, or military weapon, or powder, or lead, without a licence from the court of the county or corporation; which licence may, at any time, be withdrawn. Arms, &c. so kept, shall be forfeited to the informer.

Sect. 2. Every constable shall give information against, and prosecute every offender against this act.

Sect. 3. On a second conviction, the free negro or mulatto may, in addition to the forfeiture, be whipped, not exceeding thirty-nine lashes.

Act of 1807 (2 *Rev. Code*, ch. 119, p. 147.) further preventing the practice of slaves going at large, and hiring themselves out, see *ant.* under act of 1800; 1 *Rev. Code*, ch. 283, p. 412.

As to the punishment of slaves, for burning barns, corn-houses, &c. see title PENITENTIARY.

(A) *Certificate of the seizure of a gun, &c. on sect. 8, of*  
1 *Rev. Code*, p. 187.

county, to wit.

Whereas A J, of the county aforesaid, labourer, hath this day brought before me, J P, a justice of the peace for the said county, one gun, with powder and shot, by him found and seized in the hands and possession of a certain free mulatto man, known by the name of  
(or negro man slave belonging to as the case may be)  
who is not by law qualified to keep the same; and the said A J having also, before me, made due proof of such seizure as aforesaid. By virtue of an act of the general assembly in that case made and provided, I do hereby order and direct, that the said A J shall and may retain the said gun, powder and shot, to his own use; and that the said mulatto man shall receive thirty lashes upon his bare back, well laid on, which last sentence A C, a constable in this county, is ordered to execute. Given under my hand and seal, &c.

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peace for the county aforesaid, to be dealt with according to law: and you are also required to summon the said A M, to appear at the time and place appointed by you for the production of said slave, to answer the said complaint. Given under my hand and seal, &c.

☞ This warrant may be directed to any sworn officer.

*(I i) Recognizance to be entered into by the owner or holder, on sect. 3.*

Be it remembered, that on this                      day of                      in the year  
A M, of                      B S, of                      and C S, of                      personally appeared before me, J P, one of the justices of the peace for the county of                      aforesaid, and acknowledged to owe and be indebted to J T, governor or chief magistrate of this commonwealth, and his successors in office, that is to say, the said A M in the sum of                      and the said B S and C S, each, the sum of                      separately, of good and lawful money of this commonwealth, to be made and levied of their goods and chattels, lands and tenements, respectively, to the use of the commonwealth, if the said A M shall make default in the condition here underwritten.

The condition of the above recognizance is such, that if the above bound A M shall personally appear at the next court to be held for the said county of                      then and there to answer a complaint made against him by O P, one of the overseers of the poor for the county aforesaid, for having brought into this state from                      contrary to law, a certain negro man slave, named S, and having kept the said slave within this commonwealth one whole year and upwards; and shall then and there abide by and perform the order of the said court, in the premises, then the above obligation to be void, else to remain in full force.

Acknowledged before me.

☞ If the proceedings be against a person who is not the owner, but a mere possessor, or who did not actually bring the slave into the state, the precedents must be varied to suit the case.

*(J j) Commitment of the slave to the sheriff, on sect. 4.*

to wit.

To the sheriff of the said county,

Whereas S, a negro man slave, owned by A M, of the county aforesaid, hath been brought before me, on the complaint of O P, one of the overseers of the poor for the said county, that the said slave had been brought into this state from                      contrary to law, and remained in the said state more than one whole year, whereby the right of the said slave was forfeited and vested in the overseers of the poor for the said county; and the said A M (*not being in this county, or failing to appear and answer the said complaint, bring duly summoned, or bring unable, or refusing to give security for his appearance at the next court, to be held for the said county of                      as the case may be.*) These



are therefore to require you to receive the said slave S in your custody, and him safely keep, so that you have him before the next court to be held for this county, then and there to be dealt with according to law.

SODOMY. See BUGGERY.

STOLEN GOODS. See SEARCH WARRANT (*Restitution.*)

STRAY. See ESTRAY.

## SUMMONS.

IT being a principle of justice that no person shall be condemned unheard; whenever a complaint is lodged against an offender, the magistrate should cause him to be brought before him, either by warrant or summons. Where a statute directs a particular mode of convening the party, that mode should be strictly pursued. But where it is left discretionary with the magistrate, a summons seems the most proper process. Yet in cases of surety for the peace, petty larcenies, and other felonies, and generally where the commonwealth is party, and also in cases between party and party, where the body of the offender is liable, a warrant is the regular process, and not a summons. *Burn's Just. tit. SUMMONS.*

In a summons it is usual, and upon many accounts convenient, to fix not only a day, but a particular time of the day, for the party's appearing, but if he shall appear at the time, and the justice shall not attend, he is not to go away, but must wait the remaining part of the day, for many things may happen to prevent the justice's immediate attendance. (*Ibid.*) So in the case of the execution of a writ of inquiry, where the plaintiff having attended at the hour appointed, and the sheriff not then attending, went away, and the writ was executed afterwards on the same day, in his absence, the court held that the execution was regular, and he ought to have waited; for the sheriff might have prior business to attend, which may last beyond the hour. And it is never understood that the time on these occasions is to be scrupulously adhered to. *Doug.* 188.

### *General form of a summons.*

county, to wit.

Whereas information and complaint hath been made before me, J P. one of the commonwealth's justices of the peace for the county aforesaid, that A O, of \_\_\_\_\_ in the county aforesaid, labourer, on the \_\_\_\_\_ day of \_\_\_\_\_ now last past, at \_\_\_\_\_ in the county aforesaid, did (*here recite the offence.*) These are therefore to require you forthwith to summon the said A O to appear before me, at \_\_\_\_\_ in the said county, on \_\_\_\_\_ the \_\_\_\_\_ day of \_\_\_\_\_ at the hour of \_\_\_\_\_ in the \_\_\_\_\_ noon of the same day, to answer the said infor-

mation and complaint, and to be further dealt with according to law. And be you then there, to certify what you shall have done in the premises. Herein fail not. Given under my hand and seal, the day of \_\_\_\_\_ in the year of our Lord \_\_\_\_\_ To the constable of \_\_\_\_\_

*Summons for a witness.*

county to wit. To the constable of \_\_\_\_\_ Whereas information hath been made before me, J P, one of the commonwealth's justices of the peace for the said county, that (*here recite the offence*) and that A W, of \_\_\_\_\_ in the said county, is a material witness to be examined concerning the same. These are therefore to require you to summon the said A W to appear before me, at \_\_\_\_\_ in the said county, on \_\_\_\_\_ the \_\_\_\_\_ day of \_\_\_\_\_ at the hour of \_\_\_\_\_ in the \_\_\_\_\_ noon of the same day, to testify his knowledge concerning the premises. Herein fail not. Given under my hand and seal, the \_\_\_\_\_ day of \_\_\_\_\_ in the year of our Lord \_\_\_\_\_

SUNDAY. See SABBATH.

## SURETY FOR THE PEACE.

SURETY for the peace is one of the branches of preventive justice, and consists in obliging those persons whom there is probable ground to suspect of future misbehaviour to stipulate with, and give full assurances to the public, that such offence as is apprehended shall not happen, by finding pledges or securities for keeping the peace. 4 Bl. Com. 248.

*I. In what cases surety of the peace ought to be taken ex officio. II. For and against whom it ought to be granted. III. For what cause it may be granted. IV. In what manner it shall be granted. V. How a peace warrant should be executed. VI. Form of a recognizance of the peace. VII. How such recognizance may be forfeited. VIII. How such recognizance may be discharged. IX. Various precedents.*

### I. IN WHAT CASES SURETY FOR THE PEACE OUGHT TO BE TAKEN EX OFFICIO.

Any justice of the peace [or conservator of the peace, *Leach's Hawk*, (7th edit.) vol. ii. p. 4.] may, according to his discretion, bind all those

to the peace, who, in his presence shall make any affray, or shall threaten to kill or beat any person, or shall contend together with hot words, or shall go about with unusual weapons or attendants, to the terror of the people; and also all such persons as shall be known to him to be common barrators; and also all those who shall be brought before him by a constable, for a breach of the peace in presence of such constable; and all such persons, who, having been before bound to keep the peace, shall be convicted of having forfeited their recognizance. *Haw. B. 1, c. 60, sect. 1.*

## II. FOR AND AGAINST WHOM IT OUGHT TO BE GRANTED.

1. It seems agreed at this day, that all persons whatsoever, under the protection of the commonwealth, being of *sane memory*, whether they be natural and good citizens, or *aliens*, or attainted of *treason*, &c. have a right to demand surety of the peace. *Ibid. sect. 2.*

It is certain that a wife may demand it against her husband, threatening to beat her outrageously, and that a husband may also have it against his wife. *Ibid. sect. 4.*

And if the marriage be disputed, the court will order the recognizance to be drawn so as to suit the fact of the case. 2 *Str.* 1231.

According to Mr. Dalton, an infant under the age of fourteen years is entitled to this surety. But a person of *non sane memory* shall neither have it granted for him nor against him upon his own request; but the justice ought to provide for his safety. *Dalt. c. 117.*

2. There seems to be no doubt, but that it ought, upon just cause of complaint, to be granted by any justice of the peace, against any person whatsoever, being of *sane memory*, whether he be a magistrate or private person, and whether he be of full age, or under age, &c. *Haw. B. 1, c. 60, sect. 5.*

But feme coverts, and infants under age, ought to find surety by their friends only, and not to be bound themselves; for they are incapable of answering any debt, which is the nature of these recognizances or acknowledgments. 4 *Bl. Com.* 248.

## III. FOR WHAT CAUSE IT MAY BE GRANTED.

Wherever a person has just cause to fear that another will burn his house, or do him corporal hurt, as by killing or beating him, or that he will procure others to do him such mischief, he may demand the surety of the peace against such person, and that every justice of the peace is bound to grant it, upon the party's giving him satisfaction upon oath, that he is actually under such fear, and that he has just cause to be so, by reason of the other's having threatened to beat him, or laid in wait for that purpose; and that he doth not require it out of malice, or for vexation. *Haw. B. 1, ch. 60, sect. 6.*

Also, it seems the better opinion, that he who is threatened to be imprisoned by another, has a right to demand the surety of the peace; for every unlawful imprisonment is an assault and wrong to the person of a man. And the objection, that one wrongfully imprisoned may recover damages in an action, and therefore needs not the surety of the

peace, is as strong in the case of battery as imprisonment; and yet there is no doubt, but that one threatened to be beaten may demand the surety of the peace. *Ibid.* sect. 7.

Mr. Dalton recommends great caution in granting surety for the peace, especially where the application seems to arise from malice. He also says, that surety for the peace shall not be granted merely because the applicant is at variance, or in suit, with another; and both Lambard and Dalton think it is not grantable for fear of danger to the complainant's servants or cattle. See *Lamb.* 83. *Dalt.* ch. 116.

Mr. Dalton thinks, that if a man threatens to beat the wife or child of another, he may demand surety of the peace against him. *Dalt.* ch. 116.

But surety for the peace is grantable only on an apprehension of present or future danger, not for a battery, &c. that is past; in this last case the offender may be indicted. See *Dalt.* ch. 116.

Surety of the peace may be granted to a person, for dread of damage to him and his men, by such as have discord with him. 4 *Comy. Dig.* 215.

#### IV. IN WHAT MANNER IT SHALL BE GRANTED.

It seemeth certain, that if the person to be bound be in the presence of the justice, he may be immediately committed, unless he offer sureties; and from hence it follows *a fortiori*, that he may be commanded by word of mouth to find sureties, and committed for his disobedience; but it is said, that if he be absent, he cannot be committed without a warrant from some justice of the peace, in order to find sureties, and that such warrant ought to be under seal, and to shew the cause for which it is granted, and at whose suit, and that it may be directed to any indifferent person. *Haw. B.* 1, ch. 60, sect. 9.

The warrant may direct the party to be brought either before the justice himself, who granted it, or before any other justice; but it is most usual to direct the party to be brought before him only; for it is presumed that he has the best knowledge of the fact. 5 *Co.* 59.

The issuing the writ of *supplicavit* not being among the powers of a justice of the peace (for whose information this writ is intended) nothing need here be said of it. See 4 *Comy. Dig.* 215.

#### V. HOW A PEACE WARRANT SHOULD BE EXECUTED.

1. It can only be executed by some one of the officers, or persons, to whom it is directed. *Haw. B.* 1, ch. 60, sect. 11.

2. It seems generally agreed, that where a person authorised by warrant of a justice of the peace to compel a man, who is sheltered in an house, to find sureties for the peace, or good behaviour, is denied quietly to enter into it, he may justify breaking open the doors, in order to take him; but he must first signify to those in the house the cause of his coming, and request them to give him admittance. 2 *Hawk.* 86. *Fost.* 321.

3. If the warrant specially direct that the party be brought before the justice who made it, the officer ought not to carry him before any

other; but if the warrant be general, to bring him before any justice of such place, the officer has his election to bring him before what justice he pleaseth. *Haw. B. 1, ch. 60, sect. 12, 13.*

4. It is said by Hawkins, Dalton, and Hale, that if the party refuse to go before a justice, or to find sureties, the constable may commit him to jail. See *1 Hawk. 128. Dalt. ch. 118. 2 H. H. 112.*

But with due submission to those great authorities, I apprehend that no such power as that contemplated by this kind of warrant is given to constables, either in England or America. For, if it be admitted that he may commit the offender to prison, for a refusal to find sufficient sureties, we must also grant him the power of judging what acts will constitute such refusal, as well as to administer an oath to the securities, in order to judge of their sufficiency or insufficiency; the former might be made an engine of oppression; the latter would evidently be illegal.

5. If the officer do arrest the party, and do not carry him before the justice to find sureties; or if he neglect any part of his duty arising under the warrant, he is punishable by indictment and fine, by the court, and also liable to the action of the party for false imprisonment; for where an officer doth not pursue the effect of his warrant, his warrant will not excuse him for what he hath done. *Dalt. c. 118.*

6. When the party cometh before the justice, he must offer sureties, or else the justice may commit him: for the justice needeth not demand surety of him. (*Dalt. c. 118, 169.*) But it is said by Pratt, in the case of the king *v. Wilkes*, that a justice cannot commit for not finding security, until the party has been required, and has refused so to do. *2 Leach's Hawk. 7. note (6).*

7. If the justice was deceived in the sufficiency of the securities, he or any other justice may afterwards compel the party to find and put in other sufficient securities, and may take a new recognizance for the same. *Dalt. c. 116, 119.*

8. But if the sureties die, the party principal shall not be compelled to find new sureties. *Ibid. 119.*

9. Also, if a man that was bound to keep the peace hath broken his bond, the justices ought of discretion to bind him anew. *Lamb. 78.*

But not until he be thereof convicted by due course of law; for before conviction he standeth indifferent whether he hath forfeited his recognizance or not. *Crompt. 125.*

## VI. FORM OF A RECOGNIZANCE OF THE PEACE.

It seems that a recognizance of the peace may be regulated by the discretion of the justice, both as to the number and sufficiency of the sureties, and the largeness of the sum, and the continuance of the time for which the party shall be bound. And it hath been said, that a recognizance to keep the peace, as to a person, for a year, or for life, or without expressing any certain time (in which case it shall be intended for life) or without fixing any time or place for the party's appearance, or without binding him to keep the peace, against all the citizens of the commonwealth in general, is good. *Dalt. c. 119, 120. Haw. B. 1, c. 60, sect. 15. 1 Term Rep. 696.*

However it seems to be the safest way to bind the party to appear at the next sessions of the peace, and in the meantime to keep the peace as well towards all the citizens of the commonwealth, as particularly to the party praying it, according to the common form of precedents. *Haw. B. 1, c. 60, sect. 16.*

## VII. HOW SUCH RECOGNIZANCE MAY BE FORFEITED.

1. The recognizance is forfeited, if the party make default of appearance, and the same default shall be recorded. *3 Haw. 7, c. 1.*

If the party have any excuse for not appearing, it seems the court is not bound peremptorily to record his default, but may equitably consider of the reasonableness of such excuse. *Haw. B. 1, c. 60, sect. 18.*

And Mr. *Dalton* says, in case of the sickness of the party, so that he cannot appear, he has known that the justices, upon due proof thereof, have forbore to certify or record such forfeiture or default; and that they have taken sureties of the peace, from some friend of his present in court, until the next court, for that the principal intent of the recognizance was but the preservation of the peace. *Dalt. c. 120.*

2. Also there is no doubt but that it may be forfeited by any actual violence to the person of another, whether it be done by the party himself, or by others through his procurement; as manslaughter, rape, robbery, unlawful imprisonment, and the like. *Haw. B. 1, c. 60, sect. 20.*

3. Also it hath been holden, that it may be forfeited by any treason against the commonwealth, and also by any unlawful assembly in terror of the people, and even by words tending directly to a breach of the peace, as by challenging one to fight, or, in his presence, threatening to beat him. *Haw. B. 1, c. 60, sect. 21.*

Otherwise it is, if the party be absent; and yet if the party so bound shall threaten to kill or beat another who is absent, and after shall lie in wait for him, to kill or beat him, this is a forfeiture of his recognizance. *Dalt. c. 121.*

4. However, it seems that it shall not be forfeited by bare words of heat and choler, as the calling a man a knave, teller of lies, rascal, or drunkard; for though such words may provoke a cholerick man to break the peace, yet they do not directly challenge him to do it, nor does it appear that the speaker intended to carry his resentment any further. And it is said, that even a recognizance for the good behaviour shall not be forfeited for such words; from whence it follows, *a fortiori*, that a recognizance for the peace shall not. *Haw. B. 1, ch. 60, sect. 22.*

5. Also there are some actual [justifiable] assaults on the person of another, which do not amount to a forfeiture of a recognizance for the peace: As if an officer, having a warrant against one who will not suffer himself to be arrested, beat or wound him in the attempt to take him; or if a parent, in a reasonable manner, chastise his child, or a master his servant, being actually in his service at the time; or a schoolmaster his scholar; or a jailor his prisoner; or even a husband his wife, as some say; or if one confined a friend who is mad, and bind and beat him, &c. in such a manner as is proper in his circumstances; or if a man force a sword from one who offers to kill another

therewith ; or if a man gently lay his hands on another, and thereby stay him from exciting a dog against a third person ; or if I beat one (without wounding him, or throwing at him a dangerous weapon) who wrongfully endeavours with violence to dispossess me of my land, or goods, or the goods of another delivered to me to be kept for him, and will not desist upon my laying my hands gently upon him, and disturbing him ; or if a man beat, or, as some say, wound, or maim one who makes an assault upon his person, or that of his wife, parent, child, or master, especially if it appear that he did all he could to avoid fighting before he gave the wound ; or if a man fight with or beat one who attempts to kill any stranger ; or if a man even threaten to kill one who puts him in fear of death, in such a place where he cannot safely fly from him ; or if one imprison those whom he sees fighting till the heat is over. *Ibid.* sect. 23.

6. But it seems agreed, that no one shall forfeit such a recognizance, by a bare trespass of another's lands, or goods, unless it be accompanied with some violence to the person. *Ibid.* sect. 25.

7. Nor in the exercise of lawful sports. 4 *Com. Dig.* 221.

But it is said, that he who wounds another in fighting with naked swords, does in strictness forfeit such a recognizance, because no consent can make so dangerous a diversion lawful. *Haw. B. 1*, ch. 60, sect. 26.

8. Nor will scolding words be a forfeiture ; for an act must be done. 4 *Inst.* 180.

9. Nor will a hurt arising from negligence or mischance ; though the party would be bound to answer for it in a civil action. *Haw. B. 1*, ch. 60, sect. 27.

#### VIII. HOW SUCH RECOGNIZANCES MAY BE DISCHARGED.

1. He who is bound to keep the peace, and to appear at a certain day, must appear at that day, and record his appearance, although he who craved the peace cometh not to desire that it may be continued ; otherwise the recognizance cannot be discharged. *Dalt. c.* 120.

2. It may be discharged by the death of the principal party bound thereby, if it was not forfeited before. *Haw. B. 1*, c. 60, sect. 17.

3. Mr. *Hawkins* doubts whether the party complaining can discharge a recognizance for the peace. *Ibid.*

4. But it is sometimes discharged by the release of the prosecutor, on motion, by producing his consent verified by affidavit :—or consenting by counsel. 4 *Com. Dig.* 222.

5. And if a man be bound to keep the peace towards the commonwealth, and all its citizens, but not towards any particular person, and to appear at such a sessions, the court at that sessions may make proclamation, that if any one can shew cause, why the peace granted against such a one shall be continued, he shall speak ; and if no person cometh to demand the peace against him, or to shew cause why it should be continued, then the court may discharge him. But if a man be bound as aforesaid, and especially to keep the peace towards a certain person, there, though such person cometh not to desire the peace may be continued, yet the court by their discretion may bind

him over to the next sessions, and that may be to keep the peace against that person only, if they shall think good. *Dalt.* ch. 120.

And it is said that the sureties are not discharged by their death, but that their executors or administrators continue bound, as their testators, or intestates were. *Haw. B. 1, c. 60, sect. 17.*

6. Likewise, if the party be imprisoned for default of sureties, and after he that demanded the peace against him happen to die; it seemeth the justice may make his *liberate* or warrant for the delivery of such prisoner; for, after such death, there seemeth no cause to continue the other in prison. *Dalt. c. 118.*

Also, any justice may, upon the offer of such prisoner, take surety of him for the peace, and may thereupon deliver him. *Dalt. c. 118.*

There is yet another mode (and by far the most usual in this state) in which a recognizance for the peace may be discharged; which is, by the act of the court itself to which such recognizance is returnable, on a full examination of the evidence, as well on behalf of the complainant, as the party accused. For although it is strongly holden, in the books, 'That the court will not permit the truth of the allegations to be controverted by the defendant, but will order security to be taken immediately, if no objections arise upon the face of the articles themselves' (*Str. 1202.*) Yet it is the constant practice, in the courts of this commonwealth, to go into a full inquiry of the facts, and to release or bind the party, as they may judge most proper from the nature and circumstances of the case.

## IX. VARIOUS PRECEDENTS.

### (A) *Form of the oath to be administered to the person demanding surety of the peace.*

You shall swear that the surety for the peace which you now require against A O proceeds from a well grounded fear that the said A O will burn your house, or do you some corporal hurt, or that he will procure some other person or persons to do you such injury; and that you have just cause to be afraid in consequence of the said A O's threats; and that you do not require such surety out of malice, or for vexation. So help you God.

### (B) *Warrant for the peace.*

county, to wit.

Whereas A J, of                      in the said county, yeoman, hath personally come before me, J P, one of the commonwealth's justices, assigned to keep the peace in the said county, and hath taken a corporal oath, that he, the said A J, is afraid A O, of                      in the said county, labourer, will beat him (wound, maim, kill,) or do him some bodily hurt, and hath therefore prayed surety of the peace against him, the said A O: These are therefore on the behalf and in the name of the commonwealth to command you, that immediately upon the receipt hereof you bring the said A O before me, to find surety, as well for



his personal appearance at the next court to be holden for the said county, as also for his keeping the peace, in the mean time, towards the citizens of this commonwealth, and chiefly towards the said A J. Given under my hand and seal, at \_\_\_\_\_ in the said county, the day of \_\_\_\_\_ in the year \_\_\_\_\_

J P. [*Seal*]

*Note.* This warrant may be directed to the sheriff, constable, or to any private person by name, who is no officer; for the justice may authorise any one to be his officer whom he pleases to make such; but it is most adviseable to direct it to the constable of the precinct wherein it is to be executed; for that no other constable, and, *a fortiori*, no private person, is compellable to serve it. *Haw. B. 2, c. 13, sect 27.*

(C) *Warrant for the good behaviour, from*  
Lambard & Dalton,

*county, to wit.*

A P, and B P, justices of the commonwealth, assigned to keep the peace within the said county, to the sheriff of the said county, and to all and singular the constables, and other officers in the said county, greeting :

Forasmuch as we are given to understand, from the information, testimony, and complaint of many credible persons, that A O, of \_\_\_\_\_ in the said county, gentleman, and B O, of \_\_\_\_\_ in the same county, yeoman, are not of good name and fame, nor of honest conversation, but evil doers, rioters, barrators, and disturbers of the peace of the commonwealth, so that murder, homicide, strifes, discords, and other grievances and damages, amongst the citizens of the said commonwealth, concerning their bodies, are likely to arise thereby: Therefore, on behalf of the said commonwealth, we command you, and every of you, that you omit not by reason of any liberty within the county aforesaid, but that you attach, or one of you do attach, the aforesaid A O and B O, so that you have them before us, or others our fellows, justices of the said commonwealth, assigned to keep the peace within the county aforesaid, as soon as they can be taken, [or before the justices of the said commonwealth, assigned to keep the peace within the county aforesaid, and also to hear and determine divers felonies, trespasses, and other misdemeanors, in the said county committed, at the next court to be holden in and for the said county] to find then before us (or the the said justices) sufficient surety and mainprise for their good behaviour towards the said commonwealth, and all its citizens, according to the form of the statute in such case made and provided. And this you shall in no wise omit, on the peril that shall ensue thereon. And have you before us, [or, before the said justices, at the sessions aforesaid] this precept. Given under our seals, at the \_\_\_\_\_ in the county aforesaid, this \_\_\_\_\_ day of \_\_\_\_\_ in the year \_\_\_\_\_

*(D) Recognizance for the peace or good behaviour.*

county, to wit.

Be it remembered, that on the            day of            in the year  
A O, of            in the county aforesaid, yeoman, A S, of the same  
place, yeoman, and B S, of the same place, yeoman, came before me,  
one of the commonwealth's justices of peace for the county afore-  
said, and acknowledged themselves to owe to C M, esquire, governor  
or chief magistrate of the commonwealth of Virginia, and his suc-  
cessors, to wit, the said A O, the sum of            dollars, and the said A  
S, the sum of            dollars, and the said B S, the sum of            dol-  
lars, current money of Virginia, to be respectively levied and made of  
their several goods and chattels, lands and tenements, to the use of the  
commonwealth aforesaid, if he, the said A O, shall fail in performing  
the condition underwritten.

The condition of this recognizance is such, that if the above bound  
A O shall personally appear at the next court, to be holden in and  
for the county of            aforesaid, to do and receive what shall then  
and there be enjoined him by the said court, and in the mean time  
shall keep the peace [or, be of the good behaviour; or, shall keep the  
peace, and be of the good behaviour] towards the commonwealth and  
all its citizens, and especially towards A J, of            in the said county,  
yeoman: Then the said recognizance shall be void, or else remain  
in full force.

*(E) Mittimus for want of sureties.*

county, to wit.

*To the constable of            and to the keeper of the jail in the said  
county.*

Whereas A O, of            in the said county, yeoman, is now brought  
before me, J P, one of the commonwealth's justices, assigned to keep  
the peace in the said county, requiring him to find sufficient sureties  
to be bound with him in a recognizance, for his personal appearance  
at the next court to be holden in and for the said county, and in the  
mean time to keep the peace [or, be of the good behaviour] towards  
the said commonwealth, and all its citizens, and especially towards A  
J, of            in the said county, yeoman; and whereas he, the said A  
O, hath refused, and doth now refuse before me, to find such sureties:  
These are therefore, in the name of the commonwealth, to command  
you, the said constable, forthwith to convey the said A O to the com-  
mon jail of the said county, and to deliver him to the keeper thereof  
there, together with this precept: And I do, in the name of the  
said commonwealth, hereby command you, the said keeper, to receive  
the said A O into your custody, in the said jail, and him there safely  
keep, until he shall find such sureties as aforesaid, [or, be otherwise  
*discharged by due course of law*]. Given under my hand and seal, at  
   in the said county, this            day of            in the year

*(F) Liberate, or warrant to the jailor to discharge one committed for want of sureties.*

county, to wit.

J P, one of the commonwealth's justices, assigned to keep the peace within the said county, to the keeper of the jail in the said county, greeting :

Forasmuch as A O, in the public jail in your custody now being, at the suit of A J, of        in the said county, yeoman, for the want of his finding sufficient sureties for his personal appearance at the next court, to be holden in and for the said county, and for his keeping the peace [*or, being of the good behaviour*] in the mean time, towards the said commonwealth of Virginia, and its citizens, and all especially towards the said A J, hath found before me sufficient sureties, to wit, A S, of        yeoman, and B S, of        yeoman, either of which hath undertaken for the said A O, under the pain of        dollars, and he, the said A O, hath undertaken for himself, under the pain of        dollars, that he, the said A O, shall and will personally appear at the next court, to be holden in and for the said county, and shall well and truly keep the peace [*or, be of the good behaviour*] in the mean time, towards the said commonwealth, and all the citizens thereof, and especially towards the said A J. Therefore, on behalf of the said commonwealth, I do command you, that if the said A O do remain in the said jail, for the said cause, and for none other, then you forbear to grieve or detain him any longer, but that you deliver him thence, and suffer him to go at large, and that upon the pain that will fall thereon. Given under my hand and seal, at        in the said county, this        day of        in the year

## SURETY FOR THE GOOD BEHAVIOUR.

SURETY for the good behaviour resembles in so many instances surety for the peace, both as to the manner in which it is to be taken, superseded, and discharged; that it will not require a particular consideration, except as to the following points :

*I. For what misbehaviour it is to be required. II. For what it shall be forfeited.*

### I. FOR WHAT MISBEHAVIOUR IT IS TO BE REQUIRED.

This species of recognizance, with sureties, which includes surety for the peace, and something more, may be required by the judges of the court of appeals, high court of chancery, and general court, and

the justices of the peace in each county and corporation, of *such persons who are not of good fame*. See 1 *Rev. Code*, ch. 69, p. 94.

Under the act of 34 *Edw.* 3, c. 1, which uses the same general mode of expression, it hath been holden, that a man may be bound to his good behaviour for causes of scandal *against good morals*, as well as *against the peace*; as for haunting bawdy houses with women of bad fame, or for keeping such women in his house. Thus also, night-walkers; eaves-droppers; such as keep suspicious company, or are reported to be pilferers or robbers; such as sleep in the day, and walk in night, common drunkards; whoremasters; the putative fathers of bastards; cheats; idle vagabonds; and other persons whose misbehaviour may reasonably bring them within the general words of the statute, as persons not of good fame; an expression it must be owned of so great a latitude, as leaves much to be determined by the discretion of the magistrate himself. But if he commits a man for want of sureties, he must express the cause thereof with convenient certainty; and take care that such cause be a good one. 4 *Bl. Com.* 256. *Haw. B.* 1, c. 61, sect. 2.

## II. FOR WHAT IT SHALL BE FORFEITED.

A recognizance for the good behaviour may be forfeited by all the same means, as one for the security for the peace may be; and also by some others. As, by going armed with unusual attendance, to the terror of the people; by speaking words tending to sedition; or by committing any of those acts of misbehaviour, which the recognizance was intended to prevent. But not by barely giving fresh cause of suspicion, of that which perhaps may never happen: for though it is just to compel suspected persons to give security to the public against misbehaviour that is apprehended; yet it would be hard upon such suspicion, without the proof of any actual crime, to punish them by a forfeiture of their recognizance. 4 *Bl. Com.* 257. *Haw. B.* 1, c. 61, sect. 5.

The precedents for this title may be found among those under the preceding head, SURETY FOR THE PEACE.

There are also several other offences, for which surety for the good behaviour is required by law.

As, by *Virginia Laws* (1 *Rev. Code*, ch. 11, p. 19.) "it shall not be lawful for any person to offer in payment a private bank bill or note for money, payable to bearer; and whosoever shall offend herein, shall not only forfeit to the informer ten times the value of the sum mentioned in such bill or note, but may be apprehended by warrant of a justice, and upon due proof of the fact made to him, or upon his own acknowledgment thereof, be bound to the good behaviour, or if he afterwards offend in the like manner, it shall be deemed a breach of the condition of the recognizance." So, of a bank having no charter. 2 *Rev. Code*, ch. 54, p. 79.

A person convicted of unlawful gaming shall find surety for his good behaviour, for twelve months. See acts referred to under title GAMING.

So, for keeping a tippling house, &c. See ORDINARIES.

A person convicted a third time of unlawful hunting. See HURTING.

☞ For other cases, see the respective titles of this volume.

## SWEARING.

THE penalties for profane swearing, cursing, or getting drunk, are eighty-three cents for each offence, on conviction, by the oath of one or more witnesses, the confession of the party, or the offence being committed in presence of a magistrate. See *Virginia Laws*, 1 Rev. Code, ch. 138, sect. 1, p. 276.

The prosecution must be commenced within two months. *Ibid.* sect. 2.

### Summons.

county, to wit. To constable.

Whereas information hath this day been made before me, J P, one of the commonwealth's justices of the peace for the said county, upon the oath of A J, of that on the day of in the year he heard A O, of in the said county, at in the said county, swear one profane oath (*or, curse one profane curse; or, saw the said A O drunk.*) These are therefore to command you, to cause the said A O forthwith to appear before me, to answer the premises, and to be further dealt with according to law. Given under my hand and seal, at in the said county, the day of in the year

If the conviction be for the offence committed in presence of a justice, it may be in the following form:

Be it remembered, that on the day of in the year A O was convicted before me, J P, one of the commonwealth's justices of the peace for the county of of swearing one (*or more*) profane oaths (*or cursing*) one (*or more*) profane curses, or (*of being drunk.*) Given under my hand and seal, the day and year aforesaid.

The form of the warrant for distress may be found under title GAMING, &c. adapting the description of the offence to the nature of the case.

TENANT. See RENTS.

THEFT. See LARCENY.

THEFTBOTE. See FELONY.

TIPPLING HOUSES. See ORDINARIES.

## TOBACCO.

THE culture of tobacco has long been a favourite object in Virginia, and it was the only staple commodity to which the first settlers could be induced to turn their attention. (See 1st and 2d vols. *Stat. at Large, Index*, tit. *TOBACCO*.) It is matter of curiosity to trace the history and progress of the cultivation of this plant, from the infancy of our country to the present day. Various laws were, at first, enacted by the legislature, with a view to improve its quality and lessen the quantity. The *distance* at which the plants should be set apart, the *number of plants* to be tended by each labourer, and the *number of leaves* to be gathered from a plant, were all prescribed by act of assembly. At one period a law was in force, declaring, that no tobacco should be planted after a certain day in the year; at another, there was a total *suspension* from planting for a year, which was called a *cessation*, or *stint*. The size of a hogshead of tobacco was, for a number of years, three hundred and fifty pounds weight. Before any warehouses were established, the *inspection* of tobacco was performed by an order from a commander of plantations, to two men in the neighbourhood, who were to view it, and if of bad quality to burn it. After the establishment of warehouses, which was in 1633, the inspectors were, that member of the king's council who resided nearest to the warehouse, with two justices of the peace as his assistants.

The laws relating to tobacco are now so numerous and lengthy, that it would unnecessarily increase the size of the volume to insert them all. A reference will, therefore, only be made to the several acts of assembly, accompanied by such precedents as a magistrate may have occasion to use. See 1 *Rev. Code*, ch. 135, p. 252. *Ibid.* ch. 154, p. 310. *Ibid.* ch. 207, p. 365. *Ibid.* ch. 214, p. 369. *Ibid.* ch. 278, p. 409. 2 *Rev. Code*, ch. 32, p. 35. *Ibid.* ch. 37, p. 58. *Ibid.* ch. 46, p. 74. *Ibid.* ch. 58, p. 83. *Ibid.* ch. 73, p. 100. *Sess. Acts*, 1808, ch. 6, p. 16. *Ibid.* ch. 7, p. 18. *Sess. Acts*, 1809, ch. 19, p. 21.

(A) *Warrant against a picker, for refusing to pick refused tobacco, on 1 Rev. Code, ch. 135, sect. 17, p. 259.*

to wit.

Whereas information hath this day been made to me, J P, a justice of the peace for the county aforesaid, by A J, that B P, one of the pickers of tobacco at \_\_\_\_\_ warehouse, in the said county, did, on the \_\_\_\_\_ day of \_\_\_\_\_ last past, refuse to pick, and separate the good from the bad tobacco, of \_\_\_\_\_ hogshead of tobacco, belonging to the said A J, and refused by the inspectors at the said warehouse, he,

the said B P, being thereto required by the said inspectors. These are therefore to require you to summon the said B P to appear before me at            on &c to shew cause why the penalty of five dollars should not be levied upon him for his said offence. Given &c.

*(B) Warrant against a picker of tobacco, for acting without being qualified, on sect. 18.*

Whereas, &c. (as in the first)            did undertake the opening, sorting, picking, and separating tobacco brought to the said warehouse, for hire and reward, without having been qualified agreeable to law, whereby he hath forfeited the sum of four dollars. These are &c.

*(C) Warrant against an inspector for refusing to deliver tobacco when demanded, on sect. 20.*

Whereas &c. (as in the first) that            and            inspectors, &c. did refuse to deliver one hundred and ninety-nine pounds of tobacco, agreeable to their receipt given for the same, whereby they have forfeited double the amount of the said tobacco. These are &c.

*(D) Warrant to go on board a vessel to search for uninspected tobacco, on sect. 27.*

Whereas, &c. (as in the first) on oath, that there is good cause to suspect that there is a quantity of tobacco uninspected, in cask, bulk, or parcels, on board the schooner            now riding at            near this county. I do therefore authorise and require you to go on board the said schooner, and search for and seize such tobacco, and the same being seized, to bring on shore before me, or some other justice of the peace for this county, to be disposed of according to law. Given &c.

To the sheriff (or constable) of            county.


The warrant of distress, where the penalty recovered is under five dollars, may be formed from that given under title GAMING.

*(E) Form of a certificate to be given to the person who has lost a tobacco note, on sect. 41.*

county, to wit.

I do hereby certify, that on this            day of            in the year            A L, of the county of            personally appeared before me, J P, one of the commonwealth's justices of the peace for the county of            (the county where the tobacco is payable) and made oath, that on or about the            day of            last past, he casually lost, (mistaid, or destroyed, as the case may be) a receipt for            one hoghead of tobacco, granted by            and            inspectors of tobacco, at            warehouse, in the county of            aforesaid, marked, &c.

(here insert the marks, numbers, weights, to whom and where payable) and that at the time said receipt was lost (mistaid, or destroyed) be, the said A L, was lawfully entitled to receive the said tobacco therein mentioned. Given &c.

 The provisions of this act extended to executors and administrators. See *Stat. Acts*, 1808, ch. 6, sect. 5, p. 17.

*(F) Form of the bond to the inspectors, on sect. 41.*

*(The penalty may be in the usual form, in double the amount of the tobacco lost, payable to the inspectors, with the following condition.)*

The condition of the above obligation is such, that whereas the above bound A L hath this day produced to us, the above named and inspectors of tobacco at warehouse aforesaid, a certificate from under the hand of J P, a justice of the peace for the county of dated the day of in the year certifying, that the said A L had made oath before him to the loss of a hogshead of tobacco, marked, &c. (here insert the marks, weights, &c. as described in the certificate) for which said hogshead of tobacco the said A L hath required a duplicate of a receipt, which we, the said and have accordingly granted. Now if the said A L, and (his security) shall well and truly indemnify the person who may hereafter produce the original receipt for the said hogshead of tobacco, within twelve months from the date of the notice published of the loss of the same by the said A L, the value paid by the said holder of the original receipt for the same, then the above obligation to be void, else to remain in full force.

*(G) Warrant by two justices against the master of a vessel, for taking in tobacco in bulk or parcels, on sect. 46.*

Whereas &c. (as in the first) that A O, of did take in his vessel, now lying at near this county, sundry parcels of tobacco, contrary to the act of the general assembly in that case made and provided, whereby he hath not only forfeited the said tobacco, but fifty cents for every pound thereof. These are &c.

*(H) Warrant against the inspectors, for passing tobacco in hogsheads above the legal size, on 1 Rev. Code, ch. 207, sect. 4, p. 365.*

to wit.

Whereas information, &c. (as in form (A) that D I and F I, inspectors of tobacco at warehouse, in the said county, did, on the day of last past, inspect and pass hogshead of tobacco, belonging to M O, the hogsheads in which the said tobacco was packed exceeding the size allowed by law. These are therefore, &c. (conclude as in form (A)).



(I) *Warrant for manufacturing tobacco without a license, on 2 Rev. Code, ch. 32, sect. 1, p. 35.*

to wit.

Whereas information hath been given to me, J P, a justice of the peace for the county (or corporation) aforesaid, that T M, of &c. hath within last past, been engaged in manufacturing tobacco, at the county (or corporation) aforesaid, without having previously obtained a license for that purpose, in the manner prescribed by law. These are therefore to require you to summon the said T M, to appear before me, or some other justice of the peace for the county (or corporation) aforesaid, to shew cause why the penalty of ten dollars, for every ten pounds of tobacco so by him manufactured (or stemmed) should not be levied for the said offence. Given &c.

*Judgment.*

It appearing to me, by the evidence of A W, B W, &c. that the within mentioned T M is guilty of the offence within charged, and that he hath, within last past, manufactured (or stemmed) pounds weight of tobacco; judgment is hereby rendered against him for the sum of . And it is further ordered, that (the sergeant of the corporation, or a constable of the county) do, and he is hereby authorised and required to, seize all the tobacco to be found in the stemmery or manufactory of the said T M, together with every sort or kind of implement employed therein; and the same in his hands safely to keep, till the next court to be held for the county (or corporation) aforesaid, to which court the said is to make return how he hath executed this warrant. Given &c.

For the form of an execution, see title EXECUTION.

(K) *Warrant for selling stemmed or manufactured tobacco, without an inspector's certificate, on sect. 3.*

Whereas information hath been given to me by A I, of &c. that B S, of &c. hath, within last past, sold divers quantities of stemmed (or manufactured) tobacco, without having obtained a certificate from the inspector appointed for that purpose, as directed by law. These are therefore to require you to summon the said B S to appear before me, or some other justice of the peace for the county (or corporation) aforesaid, at on &c. to shew cause why the penalty of ten dollars, for every ten pounds of tobacco so by him sold, should not be levied for his said offence. Given &c.

The judgment, in the last precedent, may be adapted to this case, omitting what relates to the seizure, &c.

(L) *Warrant against inspectors, for not stowing away tobacco at night.*

to wit.

Whereas information hath been given to me, by A I, that B I and C I, inspectors of tobacco at warehouse, in the county (or corporation) aforesaid, did, on the day of last past, inspect hogsheads of tobacco; which they failed to stow away and secure at night, as directed by the act of the general assembly in that case made and provided. These are therefore to require you to summon the said B I and C I to appear before me, or some other justice of the peace for the county (or corporation) aforesaid, at on &c. to shew cause why the penalty of ten dollars, for each hogshead of tobacco so by them inspected during the day aforesaid, and not stowed away and secured at night, should not be levied on them for the said offence. Given &c.

## TREASON.

TREASON, according to lord Coke, is derived from *trahir*, to betray; and *trahison*, by contraction *treason*, is the betraying itself. 3 *Inst.* 4.

“If a man do levy war against this commonwealth in the same, or be adherent to the enemies of the commonwealth within the same, giving to them aid and comfort in the commonwealth or elsewhere, and thereof be legally convicted of open deed, by the evidence of two sufficient and lawful witnesses, or their own voluntary confession, the cases above rehearsed shall be adjudged treason, which extendeth to the commonwealth; and the person so convicted shall suffer death, without benefit of clergy.” *Virginia Laws*, 1 *Rev. Code*, ch. 136, p. 272, sect. 1.

As to treason against the United States, see *Const. U. S.* art. 3, sect. 3; and, for an able investigation of the subject, and a faithful report of the case, see *Burr's Trial*, reported by *Robertson*.

So to erect a government within the limits of this commonwealth, independent of it, &c. 1 *Rev. Code*, ch. 136, sect. 2, p. 272.

High treason, &c. is triable in the general court. *Ibid.* sect. 7, p. 273.

The governor, &c. may suspend the execution for treason, but a pardon can only be granted by the assembly. *Ibid.* p. 318.

The judgment for treason, by the common law, is, that the person be dragged to the place of execution, there hanged by the neck, cut down alive, his entrails taken out and burnt before his face, his head cut off, his body divided into four quarters, &c. See 2 *Hawk.* 443.

The judgment against a woman is, that she be drawn and burnt. 3 *Inst.* 211.

These were the severities of the common law, when to imagine the death of the king, queen, or their eldest son or daughter; or to have carnal knowledge of the king's wife or eldest daughter, &c. constituted high treason. But it may well be doubted how far such judgments could now be given in this state, since by the declaration of rights (art. 9.) "*cruel or unusual punishments shall not be inflicted.*"

By the penitentiary laws of 1796 (1 *Rev. Code*, ch. 200, sect. 4, p. 356.) high treason was punishable by confinement, not less than six nor more than twelve years; but by act of 1802 (2 *Rev. Code*, ch. 16, sect. 5, p. 16.) it is punishable with death.

### *Petit Treason.*

Treason has usually been distinguished into *High* and *Petit*. High treason is that which we have already mentioned, and is defined by our laws. Petit treason is declared by the statute of 25 *Edw.* 3, st. 5, ch. 21, and is, when a servant slayeth his master, or wife her husband, &c.

But by the penitentiary law (1 *Rev. Code*, ch. 200, sect. 3; p. 356) the prosecution for petit treason is the same as for murder.

### *Misprision of Treason.*

Misprision cometh of the French word *mepris*, which properly signifieth neglect or contempt. And misprision of treason, in legal understanding, signifieth, when one knoweth of any treason, though no party or consenter to it, yet conceals it, and doth not reveal it in convenient time. 3 *Inst.* 30. 1 *H. H.* 371.

The judgment of misprision of treason is, to be imprisoned during life, &c. (3 *Inst.* 36.) The forfeiture, by the common law, is taken away by our laws. See **ATTAINDER**.

**TRESPASS.** See **FENCES, FRUIT TREES.**

## VAGRANTS.

BY *Virginia Laws* (1 *Rev. Code*, ch. 102, sect. 26, p. 184.) the overseers of the poor, or any one of them, are empowered, upon discovering any vagrant within their respective districts, to make information thereof to any justice of the county, and to require a warrant for apprehending such vagrant, to be brought before him or any other justice; and if upon examination it shall appear to the justice that the person is within the description of a vagrant, as hereafter mentioned, such justice shall, by warrant under his hand, order such vagrant to be delivered to some one of the overseers of the poor of the district in which such vagrant shall have been apprehended, to be employed in labour, for any term not exceeding three months, and by the said over-

seer of the poor hired out for the best wages that can be procured, to be applied to the use of the poor. If such vagrant shall run away during the time of his service, he shall be dealt with in the same manner as other runaway servants.

The same power is given to a magistrate in a corporate town, to apprehend a vagrant; and any two magistrates may order him to the work-house; or, if there be none, deal with him as the overseers of the poor are authorised. *Ibid.* sect. 31, p. 185.

Any able bodied man, who, not having wherewithal to maintain himself, shall be found loitering, and shall have a wife or children, without means for their subsistence, whereby they may become burthensome to their county or town, and any able bodied man, without a wife or child, who, not having wherewithal to maintain himself, shall wander abroad, or be found loitering, without betaking himself to some honest employment, or shall go about begging, shall be deemed and treated as a vagrant. 1 *Rev. Code*, ch. 102, sect. 32, p. 185.

Certain gamesters are to be treated as vagrants. 1 *Rev. Code*, ch. 96, sect. 11, p. 176.


Also free negroes and mulattoes, travelling out of their county. 1 *Rev. Code*, ch. 283, sect. 6, p. 413.

### (A) *Warrant to apprehend a vagrant.*

county, to wit.

Whereas information hath this day been made to me, J. P, a justice of the peace for this county, by B O, one of the overseers of the poor for district, in the county aforesaid, that A V, an able bodied man, who, not having wherewithal to support himself, is found loitering, and has a wife and children, without means for their subsistence (*if any other description of a vagrant, mention it*). These are to require you to bring the said A V before me, or some other justice of the peace for this county, to be dealt with according to law. Given under my hand, &c.

To constable.

 If the person be a gamester, or any other description of vagrant, the warrant and other proceedings must express the fact, as in the act of assembly.

### (B) *Warrant for hiring out a vagrant.*

county, to wit.

Whereas, from the information of B O, one of the overseers of the poor for district, in this county, A V, who was described by him as a vagrant within the meaning of the act of the General Assembly, was this day brought before me, J P, a justice of the peace for the said county, and upon due examination before me, it appearing to me, that the said A V comes within the description of a vagrant, viz. that the said A V is an able bodied man, who, not having wherewithal to maintain himself, is found loitering, and has a wife and children, without means for their subsistence: These are therefore to require you to deliver the said A V to some one of the overseers of

the poor for                district, in this county; and you, the said overseer, are hereby required to receive the said A V, and him to hire out for the best wages that can be procured, to be employed in labour for the space of                days, and the monies arising therefrom to apply to the uses of the poor of this county. Given &c.

To                constable. And to some one of the overseers of the poor for                district, in the county of

## WARRANTS.

### I. OF WARRANTS FOR DEBT, DETINUE, AND TROVER, GRANTED BY A SINGLE MAGISTRATE.

THE jurisdiction of a single magistrate has progressively been increased from twenty shillings sterling, with which it commenced in the year 1643 (*see 1 vol. Stat. Large, p. 273*) to twenty dollars, at which it is now fixed. It was for a long time limited to twenty shillings, then to twenty-five shillings, afterwards to five dollars, then to ten dollars, and lastly to twenty dollars. *See Law. Virg. edit. 1752, p. 252, sect. 5, and edit. 1769, p. 169, sect. 5. 1 Rev. Code, ch. 67, sect. 6, p. 84. Ibid. ch. 271, sect. 1, p. 415.*

2 *Rev. Code, ch. 88, p. 114, sect. 1.* When any debt or penalty exclusive of interest, or the subject in controversy in trover and conversion, or detinue, shall not exceed twenty dollars, the same shall be cognizable and determinable by any one justice of the peace, who may give judgment thereon, according to the principles of law and equity, for the principal and interest due thereon, or for the value of the subject in controversy, with damages, as the case may be, and costs, and award an execution, to be directed to any constable or other officer within this commonwealth, against the goods and chattels of the debtor, or party against whom such judgment shall be rendered, to be executed and returned as other writs of *feri facias* are by law directed to be executed and returned; but no writ of *capias ad satisfaciendum* shall be granted by any justice of the peace: *Provided, however*, that no justice of the peace shall take cognizance of any attachment, where the sum demanded shall exceed ten dollars.

Sect. 2. The cause of action shall be stated in every warrant issued by a justice, requiring any person to appear before him, or some other justice, to answer in any suit for debt, detinue, or trover; and all such warrants shall be made returnable on a certain day, not exceeding thirty days from the date thereof.

Sect. 3. Executions shall be stayed on judgments given by a justice of peace for any sum exceeding ten dollars, exclusive of costs and interest, forty days; the person requesting such stay giving such security as the justice rendering such judgment shall approve, for the payment thereof, with interest, until the same shall be satisfied.

And unless such judgment shall be paid and satisfied within the period before mentioned, execution shall thereupon be granted by such justice, against the party and his security jointly, on which execution no security shall be taken.

Sect. 4. If either party, in any suit hereafter to be brought before any justice of the peace, shall think himself, herself, or themselves grieved, where the debt or subject of trover, or detinue, or damages, exclusive of interest, shall exceed ten dollars, or the sum demanded on any penal statute shall exceed five dollars, such party, within five days from the rendition of such judgment, may enter an appeal to the next monthly term, of the county or corporation court, giving such security as the justice rendering the judgment shall deem sufficient for the payment thereof, and all costs and damages, in case the same shall be affirmed.

Sect. 5. The verbal acknowledgment of any security required to be taken under this act shall be sufficient, and the endorsement by the justice of the name of such security upon the warrant, on which the judgment shall be rendered, shall be conclusive evidence of such acknowledgment.

Sect. 6. Appeals granted under this act shall be tried in a summary way, without pleadings in writing, on the day to which such appeal shall be returnable, unless good cause be shewn by either party for a continuance; and the courts, in rendering judgments thereon, shall govern themselves by the principles of law and equity. And where judgment is affirmed, the same shall be entered for the amount of the original judgment, and the costs of appeal, together with damages, after the rate of ten per cent. per annum upon the whole amount of the original judgment and costs, from the date thereof, until payment, and such judgment shall be entered against the principal and his security jointly, and execution thereon shall issue accordingly, and be endorsed, "no security to be taken." And if the judgment of the justice shall be reversed, the appellant shall recover full costs.

Sect. 7. Every justice of the peace, from whose decision an appeal is prayed, shall, on or before the day to which the same shall be returnable, transmit to the clerk the original warrant, with the judgment and the name of the security endorsed thereon. And the clerk shall docket the same, and be entitled to the same fees upon such appeals as clerks of district courts are entitled to for similar services. Any person or persons who shall be compelled to pay money under this act as a security, his, her, or their executors and administrators, shall have the same remedy against the principal or principals, his, her or their executors and administrators, by motion, for the amount so paid, with interest and costs thereon, as other securities are by law entitled to.

Sect. 8. When the constable or other officer to whom any execution shall hereafter be directed by a justice of the peace, shall not be able to find goods and chattels to satisfy the same, he shall make return thereof to the clerk of his county or corporation, who shall docket the same; and the party shall be entitled to such writ or writs of execution for the recovery of the amount due thereon, as if the judgment upon which such execution issued had been rendered in court. And the same proceedings shall be had upon executions, to be issued by

the clerks, under this act, as upon executions founded upon judgments rendered by courts of law; and the clerks shall be entitled to the same fees for the services hereby required of them, to which they would have been entitled, if such judgments had been rendered in court.

Sect. 9. Every justice of peace shall have power to issue executions and subpoenas for witnesses, to be directed to the constable or other officer of any county or corporation within this commonwealth, where the party or witness resides.

Sect. 10. If any constable or other officer shall fail to make return of any execution to him to be directed under this act, on or before the return day thereof (which shall in no case exceed sixty days from the date thereof) it shall be lawful for any justice of the peace, ten days notice being given, upon the motion of the party injured, to fine such constable or other officer, in any sum not exceeding five per centum per month, upon the amount of such execution, counting from the return day thereof.


Sect. 11. Whosoever shall bring any action or suit, if it shall appear, either by his own shewing, or the verdict of a jury, that a justice of the peace had cognizance under this act, shall be non-suited.

Sect. 12. The same fees for counsel or attorneys shall be taxed in the bills of costs, upon appeals under this act, as were heretofore taxed upon petitions and summonses.

Sect. 13. If any constable or other officer shall hereafter receive any money or tobacco upon any execution hereafter to be directed by any justice of the peace, and shall not pay the same to the party or his agent entitled thereto, upon the return of such execution, the party or parties, his, her, or their executors or administrators, injured thereby, shall be entitled to the same remedy, by motion, for the sum so received, with interests and costs, against such constable or other officer, and his security or securities, his, her or their executors and administrators, to which he would have been entitled against a sheriff, for money received on an execution issued upon the judgment of a court of law. And the court of the county or corporation, in which the bond of such constable or other officer is or shall be deposited, shall have power to hear such motion, and to render judgment thereon.

Sect. 14. Every court within this commonwealth, on reversing any judgment of any justice of the peace, shall pronounce such final judgment, as, in their opinion, such justice ought to have rendered.

Sect. 15. All acts and parts of acts contrary to this act, and particularly so much of the act, entitled "An act, reducing into one all acts and parts of acts concerning the county and corporation courts," as relates to petitions for small debts and penalties, shall be and are hereby repealed. But all such petitions as shall be commenced and undetermined before the commencement of this act shall be decided, and executions shall be issued on the judgments to be given thereon, in the same manner as if this act had not been made.

 For other matters relating to warrants, see title "CONSTABLE."


*(A) Warrant for debt: on 2 Rev. Code, ch. 88, sect. 2, p. 114.*

county, to wit.

The commonwealth of Virginia to the constable of district, in the said county, greeting.

You are hereby commanded to summon A B to appear before me, or some other justice of the peace for the county aforesaid, at on the day of next, to answer B C, of a plea of debt for due by (*account, or bond, or penal bill, or single bill, or promissory note, as the case may be*); and then and there make return how you have executed this warrant. Given &c.

(If witnesses are required, they may be summoned thus): Summon A W, B W, &c. witnesses for the plaintiff.

 The warrant must be returnable on a day *certain*, not more than *thirty* days from the date. (*See the above section.*) It must also be directed to a *constable*, and not to a sheriff. (*Sess. Acts of 1808, ch. 11, sect. 4, p. 20.*) And on the death, removal, or refusal to act, of a constable of a particular district, any other constable of the county may perform the duties of the constable of that district. *See ant. p. 194.*

*(B) Warrant in detinue.*

county, to wit.

The commonwealth of Virginia to the constable of district, in the said county, greeting.

You are hereby commanded to summon A D to appear before me, or some other justice of the peace for the county aforesaid, at on the day of next, to answer B P, of a plea of detinue for (*describe the property particularly*) and then and there make return how you have executed this warrant. Given &c.

*(C) Warrant in trover and conversion.*

county, to wit.

The commonwealth of Virginia to the constable of district, in the said county, greeting.

You are hereby commanded to summon A T to appear before me, or some other justice of the peace for the county aforesaid, at on the day of next, to answer B P, of a plea of trover and conversion, of (*describe the property*); and then and there make return how you have executed this warrant. Given &c.

*(D) Warrant for the penalty of an act of Assembly.*

county, to wit.

The commonwealth of Virginia to the constable of district, in the said county, greeting.



You are hereby commanded to summon A O to appear before me, or some other justice of the peace for the county aforesaid, at on the            day of            next, to shew cause why the penalty of            should not be levied upon him, for &c. (*here describe the offence particularly for which the law imposes the penalty*) of which the said A O is guilty, as I have been informed by B I, of            and then and there make return how you have executed this warrant. Given &c.

(E) *Judgment in debt, on a hearing.*

On hearing the parties, judgment is granted the plaintiff against the defendant, for            (*the principal and interest*) and costs.  
Costs            cents.            J. P.

☞ For the costs which may be taxed in the judgment, see title "CONSTABLE," ant. p. 194, and title "WITNESSES," post.

(F) *Judgment in detinue, on a hearing.*

On hearing the parties, judgment granted the plaintiff against the defendant, for            (*the value of the subject in controversy*) and damages, besides costs.  
Costs            cents.            J. P.

☞ The law only authorises judgment for the value of the subject in controversy, with damages and costs. (*See 2 Rev. Code, ch. 88, sect. 1, p. 114.*)

(G) *Judgment in trover, on a hearing.*

On hearing the parties, judgment granted the plaintiff against the defendant, for            damages (*the value of the subject in controversy*) and costs.  
Costs            cents.            J. P.

☞ The law having directed that judgment should be rendered for "*the value of the subject in controversy, with damages*" and costs; and further declared, that execution should issue against the goods and chattels of the defendant, "*to be executed and returned as other writs of fieri facias,*" seems to exclude the idea of a recovery of the specific thing, in detinue, as at common law; for which purpose a *distringas* is the proper process of execution, and not a *fieri facias*.

(H) *Judgment on a penal law, on a hearing.*

The defendant appearing, and being fully heard in his defence, and the witnesses on the part of the prosecution being fully examined, judgment is granted against the defendant, for            (*the amount of the penalty*) to be applied &c. (*according to the direction of the act imposing the penalty*) and the costs.  
Costs            cents.            J. P.

*(I) Judgment by default.*

The defendant having been duly summoned, and failing to appear, and the evidence adduced by the plaintiff having been duly considered, judgment is granted the plaintiff against the defendant, for &c. *(the rest of the judgment may pursue the above forms, and must be adapted to the nature of the case.)*

*(J) Stay of execution: on 2 Rev. Code, ch. 88, sect. 3, p. 115.*

*(To be endorsed on the warrant.)*

At the request of A D, the defendant, execution is stayed on the above (or, *within*) judgment        days; and thereupon B S acknowledges himself security \* for the said A D, for the payment of the said sum of        with interest, till the same shall be satisfied. Given under my hand, this        day of        in the year

J. P.

*(K) Appeal: on 2 Rev. Code, ch. 88, sect. 4, p. 115.*

*(To be endorsed on the warrant.)*

On the motion of A D, an appeal is granted him, from the above (or, *within*) judgment to the next monthly term of the court of county (or, *corporation*); and thereupon B S acknowledged himself as security in the said appeal, according to law. Given under my hand, this        day of        in the year

J. P.

☞ The warrant, judgment, and name of the security endorsed, must be transmitted by the justice to the clerk, on or before the day to which the appeal is returnable. See 2 Rev. Code, ch. 88, sect. 7, p. 115.

*(L) Summons for a witness.*

The commonwealth of Virginia to the constable of        greet-  
ing.

You are hereby commanded to summon A W to appear before me, or some other justice of the peace for the county of        at        in the said county, on the        day of        next, to testify, and the truth to speak, in a certain matter of controversy, on warrant, depending and undetermined between A P, plaintiff, and C D, defen-

\* It is observable, that the law does not require any bond, but only the verbal acknowledgment of the security. (See 2 Rev. Code, ch. 88, sect. 5, p. 115.) The author, having been a member of the legislature when the bill embracing this provision was first introduced, can say, from his own knowledge, that the object of the legislature was to simplify the business, and relieve the magistrates from the trouble of taking bonds. See Journal H. Delegates, of 1804, p. 83.

dant; and this he shall in no wise omit, under the penalty, by law, in that case made and provided. Given under my hand, at the county of the day of in the year J. P.

☞ This may be directed to the constable, or other officer, of any county, where the witness resides. (*See 2 Rev. Code, ch. 88, sect. 9, p. 116.*) The act of 1808, ch. 11, p. 20, 21, directs that warrants and executions shall alone be directed to a constable; but it is silent as to *subpoenas* for witnesses.

In exercising the jurisdiction granted by the above act, much must depend upon the discretion of the magistrate. He should, however, always have it impressed upon his mind, that too much circumspection cannot be observed in producing a fair and impartial trial. Sufficient notice of the time and place appointed for the hearing of the parties should always be given, and process awarded to summon any witnesses which might be required.

### (M) *Execution for the plaintiff in debt.*

The commonwealth of Virginia to the constable of district, in the county of greeting.

You are hereby commanded that of the goods and chattels of A D, in your district, you cause to be made the sum of which B C, lately before one of the commonwealth's justices of the peace for the county of hath recovered against him for debt; also cents, which to the said B C, before the same justice, were adjudged for his costs, in that suit expended, whereof the said A D is convict; and that you have the said debt and costs before the said justice, the day of next, to render unto the said B C, of the debt and costs aforesaid; and have then there this writ. Witness the said at the county of the day of in the year and in the year of the commonwealth.

☞ The return day of an execution shall not exceed sixty days, from its date. *See 2 Rev. Code, ch. 88, sect. 10, p. 116.*

☞ For the manner of advertising property taken under execution, see title "CONSTABLE."

☞ The execution may be directed to the constable of any county where the party resides. *See 2 Rev. Code, ch. 88, sect. 9, p. 116.*

### (N) *Execution for the plaintiff in detinue or trover.*

The commonwealth of Virginia to the constable of district, in the county of greeting.

You are hereby commanded that of the goods and chattels of A T, in your district, you cause to be made the sum of which B P, lately before one of the commonwealth's justices of the peace for the county of hath recovered against him, for damages, for the detention of &c. (*describe the property, or, "damages,"* in a certain suit for trover and conversion); also cents, which to the said B P, before the same justice, were adjudged for his costs, in that suit expended, whereof the said A T is convict; and that you have the said damages and costs before the said justice, the

day of                    next, to render to the said B P of the damages and costs aforesaid; and have then there this writ. Witness &c.

☞ When the execution is founded on a judgment upon a penal statute, it must pursue the act of assembly inflicting the penalty, and state whether it be payable to the informer, or to the informer and the overseers of the poor, or the county, &c.

☞ For more concerning executions, see title EXECUTION.

(O) *For the defendant, for costs.*

(*As before to this mark †, then say*)                    cents, which to A D, lately before                    one of the commonwealth's justices of the peace for the said county, were adjudged for his costs about his defence, in a certain complaint at the suit of B C expended, whereof he is convicted; and that you have &c. (*as before*) to render unto the said A D, of his costs aforesaid.

II. OF WARRANTS IN CRIMINAL CASES.

As to arrests without warrant, and the manner of executing them, see ARREST.

For a warrant to search for stolen goods, see SEARCH WARRANT.

*I. For what causes it may be granted. II. What is to be done previous to the granting of it. III. How far it is grantable on suspicion. IV. The form of it.*

I. FOR WHAT CAUSES IT MAY BE GRANTED.

There seems to be no doubt, but that a warrant may be lawfully granted by any justice, for treason, felony, or any other offence against the peace. Also it seems clear, that wherever a statute gives to any one justice a jurisdiction over any offence, or a power to require any person to do a certain thing ordained by such statute, it impliedly gives a power to every such justice to make out a warrant to bring before him any person accused of such offence, or compellable to do the thing ordained by such statute, for it cannot but be intended, that a statute giving a person jurisdiction over an offence, doth mean also to give him the power incident to all courts, of compelling the party to come before him. *Haw. B. 2, c. 13, sect. 15.*

But in cases where the commonwealth is no party, or where no corporal punishment is appointed, it seemeth that a *summons* is the more proper process; and for default of appearance the justice may proceed. 4 *Burn's Just.* 367. (15th edit.)

II. WHAT IS TO BE DONE PREVIOUS TO THE GRANTING OF IT.

It is convenient, though not always necessary, that the party who demands the warrant be first examined on oath, touching the whole matter whereupon the warrant is demanded, and that examination put in writing. 1 *Hale* 582. 2 *Hale* 111.

Or at least it is safe to bind him over to give evidence, lest afterwards, when the offender shall be apprehended, or shall surrender himself, the party that procured the warrant be gone. *Dalt. c. 169.*

### III. HOW FAR IT IS GRANTABLE ON SUSPICION.

It is the opinion of Hale and Hawkins, contrary to lord Coke (4 *Inst.* 177.) that warrants for felony may be granted by a justice of the peace, on probable grounds of suspicion. Yet that they should be well satisfied of the reasonableness of the accusation. See 2 *Hale* 107, 110. 1 *Hale* 597. *Haw. B. 2*, ch. 13, sect. 18.

But a general warrant, upon a complaint of robbery, to apprehend all persons suspected, and to bring them before a justice, hath been ruled void; and false imprisonment lies against him that issues such a warrant. 1 *Hale* 580. 2 *Hale* 112.

So, a warrant to seize papers, in case of a seditious libel, has been held to be illegal. 11 *State Tr.* 321. 3 *Haw.* (7th edit.) 180.

### IV. THE FORM OF IT.

It seems agreed, that the place at which the warrant is made need not be expressed in it, though it must be alledged in pleading, and the county must be set forth in the margin. See *Dalt. c. 169.* 2 *Hale* 111. *Haw. B. 2*, c. 13, sect. 23.

It may be directed to the sheriff, constable, or to any indifferent person by name, who is no officer; for the justice may authorise any one to be his officer, whom he pleases to make such; yet it is most adviseable to direct it to the constable of the precinct wherein it is to be executed, for that no other constable, and a *fortiori* no private person, is compellable to serve it. *Dalt. c. 169.* 2 *Hale* 110. *Haw. B. 2*, c. 13, sect. 27.

But in the case of an act of assembly, it is said, that if the act directeth that a justice shall grant a warrant, and doth not say to whom it shall be directed, by consequence of law it must be directed to the constable, and it cannot be directed to the sheriff, unless such power is given in the act. *L. Raym.* 1192. 2 *Salk.* 381.

Warrants may be variously styled, as, 1. In the name of the commonwealth, under the teste of the justice; 2. In the name of the justice himself; or, 3. Without any style, but only under the hand and seal of the justice.

#### 1. In the name of the commonwealth.

county, to wit.

The commonwealth of Virginia, to the sheriff of the said county, to the constable of                      in the said county, and to all and singular the commonwealth's officers of justice in the said county, greeting:

Whereas A J, of                      hath this day come before me, J P, a justice of the peace for the county aforesaid, and hath made oath, that A O, of                      &c. (*here set forth the substance of the accusation.*) These are therefore to require you to apprehend the said A O, and bring him before me, or some other justice of the peace for the said

county of \_\_\_\_\_ to answer the premises, and further to be dealt with according to law. Given under my hand and seal, &c.

Warrants are seldom issued, in this state, either in the name of the commonwealth or of the justice, but only under the hand and seal of the justice, as in that part of the above form printed in *italics*.

Regularly the warrant, especially if it be for the peace or good behaviour, or the like, where sureties are to be found or required, ought to contain the special cause and matter whereupon it is granted, to the intent that the party upon whom it is to be served may provide his sureties ready, and take them with him to the justice to be bound for him; but if the warrant be for treason, murder, or felony, or other capital offence, or for great conspiracies, rebellious assemblies, or the like, it hath been said, that it needeth not to contain any special cause, but the warrant of the justice may be to bring the party before him, to make answer to such things or matters generally, as shall be objected against him on the commonwealth's behalf. *Dalt.* c. 169. 2 *Hale* 111. *Haw. B. 2*, c. 13, sect. 25.

But Mr. Lambard says, every warrant made by a justice of the peace ought to comprehend the special matter upon which it proceedeth, even as all the commonwealth's writs do bear their proper cause in their mouth with them; and as for the form that is commonly used, *to answer to such things as shall be objected*, and such like, they are not fetched out of the old learned precedents, but lately brought in by such as either knew not, or cared not, what they writ. *Lamb.* 87.

The warrant ought regularly to mention the name of the party to be attached, and must not be left in general, or with blanks, to be filled up by the party afterwards. 2 *Hale* 114. *Dalt.* c. 169.

The warrant may issue to bring the party before the justice who granted the warrant specially, and then the officer is bound to bring him before the same justice; but if the warrant be to bring him before any justice, then it is in the election of the officer to bring him before what justice of the county he thinks fit, and not in the election of the prisoner. 1 *Hale* 582. 2 *Hale* 112.

It ought to set forth the year and day in which it is made, that in an action brought upon an arrest by virtue of it, it may appear to have been prior to such arrest; and also, in case where a statute directeth the prosecution to be within such a time, that it may appear that the prosecution is commenced within such time limited. Likewise, where a penalty is given to the poor of the parish where the offence shall be committed, or the like, it ought to specify the place where the offence was committed. *Haw. B. 2*, c. 13, sect. 22.

Finally, it ought to be under the hand and seal of the justice, who makes it out. *Ibid.* sect. 21.

But it seems that this must be understood of warrants issued for offences at common law. For where a statute directs, that a magistrate shall bring the party before him by warrant under his *hand*, it does not appear necessary that it should be under seal.

## WEIGHTS AND MEASURES.

THE regulation of the standard of weights and measures being among the powers granted to congress, the legislature of this commonwealth, in the year 1792, passed a temporary act, continuing the act of 1734, for the regulation of weights and measures, till congress shall have made provision on the subject. See 1 *Rev. Code*, ch. 140, p. 277.

Congress not having as yet legislated on the subject, it may be necessary to observe, that the act of 1734 directs, that there shall be one weight, one measure, one yard, and one ell, according the standard of the *Exchequer* in England; and that the county courts shall provide brass weights of half hundreds, quarterns, half quarterns, seven pounds, four pounds, two pounds, and one pound; and measures of bushel, half bushel, peck, and half peck, dry measure; and gallon, pottle, quart, and pint, of wine measure, with proper scales for the weights; under penalty, by each justice, of five shillings for every month such weights and measures shall be wanting, recoverable by action of debt or information in any court of record. The said standard weights and measures to be kept by some person to be appointed by the court, to whom all persons may resort to try their weights and measures; who is to seal them, when tried, by a seal to be provided by the county; and who shall be entitled to a fee of one shilling for each steelyard and certificate, and four pence for each weight and measure, and ~~selling~~ the same. The penalty for selling or buying by other than standard weights and measures, is twenty shillings for every offence. *Provided*, that the parties may, by agreement, use steelyards which have been tried and agree with the standard. See *Laws Virg.* edit. 1752, p. 135; and edit. 1769, p. 96.

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## WIFE.

1. HUSBAND and wife being considered as one person in law, there are many points of useful information arising from that principle, which deserve to be noticed.

2. Generally, husband and wife cannot be witnesses either for or against one another. See title *EVIDENCE*, p. 240.

3. But in some cases, where the wife is the party grieved, she may be a witness against her husband; as in demanding surety of the peace; in the case of a forcible abduction and marriage; where the husband was accessory to a rape on his wife, &c. See titles EVIDENCE, SURETY FOR THE PEACE, and RAPE.

4. In all cases where the crime is a violence done to the person of the other, the husband may be evidence against the wife, and the wife against the husband. This was held by all the judges in the case of *Jaggur*, who was convicted upon the evidence of his wife of an attempt to poison her. *Christian's note* (20) to 1 *Bl. Com.* 443.

5. After appearance and judgment against a woman as a feme sole, she shall not bring a writ of error, and plead that she was married at the time of her appearance. See *Stra.* 811.

6. And the court said, that it was never allowed to abate the plaintiff's writ by the act of the defendant. Plaintiffs would be in a fine condition, if, after they have arrested a woman, she shall be allowed to overthrow their proceedings by a subsequent marriage. *Ibid.*

7. A married woman may be indicted alone, for a felony committed by her. See 1 *Hawk.* 2, 3. 1 *H. H.* 47. *Dalt.* c. 157. 1 *H. H.* 516.

8. A wife may be indicted together with her husband for keeping a bawdy house. 1 *Hawk.* 2.

9. Where a married woman buys things necessary for her apparel, diet, &c. without her husband's consent, it shall bind him. See 1 *Sid.* 120. *Alley* 61. 1 *Bl. Com.* 442. 1 *Selw. N. P.* 230.

10. If the husband forbid particular persons to trust her, he shall not be chargeable; but a general prohibition not to trust her, as by putting her in a gazette, or the like, doth not amount to legal notice. 1 *Vent.* 42. *Wood's Inst.* 61.

11. If the wife voluntarily leave her husband, and live with an adulterer, the husband is not chargeable with her contracts, even though the person who trusted her had no notice of the elopement. See *Stra.* 647, 706, 875. 1 *Selw. N. P.* 232.

12. But if, after the elopement, the wife returns and lives with her husband, and he turns her away without further provocation, he is liable for her debts. *Stra.* 1214.

13. On a judgment against husband and wife, both may be taken in execution. See *Stra.* 1167, 1237. 1 *Wils.* 149.

But the authorities on the above point seem contradictory. See 1 *Lev.* 51. 2 *Stra.* (Nolan's edit.) 1167. note (1) and the cases there cited.

14. If the wife be in custody on mesne process, she shall be discharged, on filing common bail, if her coverture clearly appears. *Ibid.* and 2 *W. Bl. Ref.* 720. 1 *Term Ref.* 486.

15. By the marriage, those chattels which formerly belonged to the wife, are by act of law vested in the husband, with the same degree of property, and with the same powers, as the wife, when sole, had over them. 2 *Bl. Com.* 433.

16. But, in a real estate, he only gains a title to the rents and profits during coverture; for that, depending on feudal principles, remains entire to the wife after the death of her husband, or to her heirs, if she dies before him; unless by the birth of a child he becomes tenant for life by the curtesy. *Ibid.*



17. But though the sole and absolute property of the chattel interests of the wife vests in the husband, yet he must reduce them into possession, by exercising some act of ownership over them ; otherwise they will remain to the wife, or her representatives, after the coverture is determined. *Ibid.*

18. A *chattel real*, however, vests in the husband, not absolutely, but *sub modo*. As in case of a lease for years, the husband shall receive the rents, and may, if he pleases, sell or otherwise dispose of it during the coverture ; it is liable to execution for his debts, and if he survives his wife, it is to all intents and purposes his own. Yet, if he has made no disposition of it in his life time, and dies before his wife, he cannot dispose of it by his will, nor shall it go to his executors ; but the wife shall remain in her ancient possession. 2 *Bl. Com.* 434.

19. So, of *choses in action*, as debts upon bond, contracts, and the like ; these the husband may make his absolute property, by reducing them into possession, by receiving or recovering them at law. But, if he dies before he reduces them into possession, they shall survive to the wife. *Ibid.*

20. But the husband is entitled to be the administrator of his wife ; and may, in that capacity, recover such things *in action* as became due to her before or during coverture. 2 *Bl. Com.* 435. 1 *Rev. Code*, ch. 92, sect. 28, p. 164.

21. And the husband is not bound to make distribution of the personal estate of his wife dying intestate. *Ibid.* sect. 27, p. 164.

22. And if the husband dies before administration is granted to him, or he has recovered his wife's property, the right to administration passes to his personal representative, and not to the wife's next of kin. *Christian's note* (2) to 2 *Bl. Com.* 435. 1 *P. Wms.* 378. *Co. Lit.* 351. *Butler's note*.

23. As to the wife's *paraphernalia*, or jewels, and necessary wearing apparel, and how far they may be disposed of by the husband, or are liable to debts. See 2 *Bl. Com.* 436. 3 *Atk.* 394. 1 *P. Wms.* 730. 2 *Atk.* 642.

24. If the husband assigns the wife's *choses in action*, for a valuable consideration, and she survives, she is only bound to the amount of the consideration, and the residue survives to her. 2 *Atk.* 207. 1 *P. Wms.* (Cox's edit.) 381, note (1). ●

25. But if the husband, before marriage, makes a settlement on the wife in consideration of her fortune, the representative of the husband will be entitled to all her things in action (3 *P. Wms.* 199.) but if it be in consideration of *part* of the estate only, the residue not reduced into possession will survive to the wife : and where there is a settlement made *equivalent* to the wife's fortune, though no mention be made of her personal estate, the husband's representative will be entitled to the whole. *Christian's note* (1) to 2 *Bl. Com.* 433. *Co. Lit.* 352. *Butler's note*.

26. If the husband cannot recover the *choses in action* of his wife, but by the assistance of a court of equity, the court, upon the principle, *that he who seeks equity must do equity*, will not assist him in recovering the property, unless he either has made a previous provision for her, or agrees to do it out of the estate prayed for ; or unless the

wife appears personally in court, and consents to the property being given to him. 2 *Ves.* 669. 2 *Bl. Com.* 433. *Christian's* note.

27. But the court will not direct the fortune in all cases to be paid to the husband, though the wife appears to consent, where no previous provision whatever is made for her. 2 *Ves.* 579. 2 *Bl. Com.* 433. *Christian's* note.

28. And it is determined the wife shall have the same relief, under a general assignment by the husband of his estate, for the benefit of creditors. (4 *Bro. Ch. Ca.* 139. 2 *Bl. Com.* 433. *Christian's* note.) Nor is there any distinction made between an assignee by contract, and by operation of law. 4 *Bro. Ch. Ca.* 326. 2 *Ves. jr.* 680. 2 *Bl. Com.* 433. *Christian's* note.

29. But if the wife's fortune is paid to the husband, or he can receive it without applying to a court of equity, then it can give no relief to the wife. 2 *Atk.* 420. *Co. Lit.* 351. *Butler's* note. 1 *Fonb.* 304. 2 *Bl. Com.* 433. *Christian's* note.

30. The husband is liable to the debts of his wife, contracted by her before the coverture, and the husband and wife may be sued for such debts during the coverture. (And they *must* be joined. 7 *Term Rep.* 348.) But if these debts are not recovered against the husband and wife, in the life time of the wife, the husband cannot be charged for them, either at law or in equity, after the death of the wife. 1 *Selw. N. P.* 228, 229.

31. As on one hand, the husband is by law liable, during the coverture, to all debts contracted by the wife, *while sole*, whatever their amount may be, although she did not bring him a portion of one shilling; so on the other hand, *if such debts are not recovered during the coverture*, the husband as such is not chargeable, let the fortune he received with his wife be ever so great. 1 *Selw. N. P.* 229. 3 *P. Wms.* 409. *Ca. Temp. Talb.* 173.

32. But if there be any part of the wife's personal property, which the husband did not reduce into his possession before her death, which he must afterwards recover as her administrator, he will be liable to the extent of the value of that property to pay his wife's debts, *while sole*, which remained undischarged during the coverture. 1 *P. Wms.* 468. 1 *Bl. Com.* 443. *Christian's* note (18). 3 *P. Wms.* 409. *Ca. Temp. Talb.* 173.

33. During cohabitation the law will presume the assent of the husband to all contracts made by the wife for *necessaries*, and the misconduct and even adultery of the wife during that period will not destroy the presumption. The same law is, where the husband deserts his wife, or turns her away without any reasonable ground, or compels her by ill usage or severity to leave him; in all which cases he gives the wife a general credit. 1 *Selw. N. P.* 230.

34. If the husband turn his wife out of doors, though he advertises her, and cautions all persons not to trust her, or if he even gave particular notice to individuals not to give her credit, still he would be liable for necessaries furnished to her; for the law has said, that where a man turns his wife out of doors, he sends with her credit for her reasonable expences. *Per* *Ld. Kenyon*, in *Harris v. Morris*. 4 *Esq. Rep.* 42.

35. And if a man will not receive his wife into his house, he turns her out of doors; and if he does so, he sends with her credit for her reasonable expences. (*Per Ld. Eldon, Rawlyn's v. Vandyke.* 3 *'Esp. R. p.* 250. (Day's edit.) where the leading cases relative to the husband's liability are collected with the usual accuracy of that laborious and learned editor.

36. So, where the wife's situation in her husband's house is rendered unsafe from his cruelty or ill treatment, it has been ruled to be equivalent to a turning her out of doors; and the husband held liable for necessities furnished to her under such circumstances. *Per Ld. Kenyon, in Hodges v. Hodges.* 1 *'Esp. Rep.* 441.

37. If the husband gives express notice to a tradesman not to trust his wife, he shall not be charged; and if a tradesman has notice of a separate maintenance being allowed to the wife, that, according to Holt, chief justice, shall be notice of dissent on the part of the husband, and he shall not be charged; but where the demand is for necessities, it is incumbent on the husband to shew that the tradesman had notice of the separate maintenance. *Per Ld. Eldon, in Rawlyn's v. Vandyke.* 3 *'Esp. Rep.* 250

38. A feme covert (or married woman) having a separate estate, may, in a court of equity, be sued as a feme sole, and be proceeded against without her husband; for, in respect of her separate estate, she is looked upon as a feme sole. 2 *Vern.* 614. 1 *Bl. Com.* 444. *Christian's note* (21).

39. And in a court of equity, husband and wife are looked upon as two distinct persons, and therefore a wife by her *prochein amy* (or next friend) may sue her own husband. 3 *P. Wms.* (Cox's edit.) 39. 1 *Bl. Com.* 444. *Christian's note* (21).

40. Where the husband has abjured the country, or is banished, it has long been held, that the wife might sue, or be sued, as a feme sole. (1 *Bl. Com.* 443.) And the same principle was for some time extended to cases where the wife had a separate maintenance from the husband, and had separated from him. (1 *Term Rep.* 5.) But it has since been solemnly determined, that a feme covert cannot bring an action or be impleaded as a feme sole, while the relation of marriage subsists, and she and her husband are living in the country, notwithstanding she lives separately from her husband, and has a separate maintenance secured by deed. 8 *Term Rep.* 545. *Selw. N. P.* 236. 1 *Bl. Com.* 443. *Christian's note* (19).

41. So, where the husband is an alien, who has deserted the country, leaving his wife to act as a feme sole, the wife may be charged as a feme sole for contracts made after such desertion. 1 *Selw. N. P.* 239. 2 *'Esp. Rep.* 554, 587. 1 *Bos. & Pull.* 357. 2 *Bos. & Pull.* 236. 1 *New. Rep.* 80.

42. If a man cohabits with a woman, to whom he is not married, and permits her to assume his name, and appear to the world as his wife, and in that character to contract debts for necessities, he will become liable, although the creditor be acquainted with her real situation; for here a like assent will be implied, as in the case of husband and wife. 1 *Selw. N. P.* 235. 2 *'Esp. Rep.* 637.

## WITNESSES.

FOR matter in general relating to witnesses, see title EVIDENCE. See also *Virginia Laws*, 1 *Rev. Code*, ch. 141, p. 278, and *Index to 1st and 2d vol. Rev. Code*, tit. WITNESSES.

The only clauses of the above act of assembly, which particularly fall under the notice of a magistrate, are *sections 12 and 14*, which authorise the clerk of the court in which a suit is depending to issue a commission to take the depositions of witnesses *about to depart the country, or by age, sickness, or otherwise, unable to attend the court; or where the claim or defence, or a material point, depends on a single witness, upon affidavit thereof, or on a certificate that an affidavit has been made to that effect.*

Witnesses may be compelled to attend before a single justice of the peace. 2 *Rev. Code*, ch. 11, sect. 1, p. 8.

The fine for non-attendance, not having a reasonable excuse, is five dollars; which may be imposed by the magistrate. 2 *Rev. Code*, ch. 96, p. 122.

But if sufficient cause be shewn to the justice of the inability of the witness to attend, at the time when he ought to have attended, or within one month afterwards the witness being first served with a copy of the order imposing the fine) then no fine shall be incurred. 2 *Rev. Code*, ch. 11, sect. 1, p. 8.

Witnesses are allowed for attendance, if residents of the county, twenty-five cents a day; if non-residents, twenty-five cents a day, and three cents a mile for travelling to the place of attendance, and the same for returning, besides ferriages; to be charged to the person summoning them, and taxed in the bill of costs. *Ibid.* sect. 2, p. 8, 9.

The attendance of but one witness, to the same fact, shall be taxed in the bill of costs. *Ibid.* p. 9.

Witnesses attending a magistrate are privileged from arrests, in the same manner as those attending courts. *Ibid.* p. 9.

Subpoenas for witnesses may be issued by a justice to any county where the witness resides. 2 *Rev. Code*, ch. 88, sect. 9, p. 116.

### (A) *Summons for a witness.*

The commonwealth of Virginia to the constable of                      district,  
in the county of                      greeting.

You are hereby commanded to summon A W to appear before me                      or some other justice of the peace for the county of                      at                      in the said county, on the                      day of                      next, to testify, and the truth to speak, in a certain matter of controversy depending, by warrant, and undetermined, between A B, plaintiff, and C D, defend-

dant; and this he shall in no wise omit, under the penalty, by law, in that case provided: and then and there make return how you have executed this precept. Given under my hand, at the county of \_\_\_\_\_ aforesaid, the \_\_\_\_\_ day of \_\_\_\_\_ in the year \_\_\_\_\_.

- ✍ The above form may be used either where the witness is a resident of the same county in which his testimony is to be used, or of another. If he be a resident of the same county, the form may be abbreviated.

*(B) Certificate of a magistrate: on 1 Rev. Code, ch. 141, sect. 12, p. 279.*

county, to wit.

This day A B, of \_\_\_\_\_ personally appeared before me, J P, a justice of the peace for the county of \_\_\_\_\_ aforesaid, and made oath that B W, who is a witness for him in a suit now depending in the court of \_\_\_\_\_ between the said A B, plaintiff, and C D, defendant, is about to depart this country, [or by age, sickness, or otherwise, will be unable to attend the said court, (as the case may be.) Given &c.

*(C) Certificate for obtaining the deposition of a single material witness: on 1 Rev. Code, ch. 141, sect. 14, p. 279.*

As before to made oath that he verily believes his claim (or defence) or a material point thereof, in a suit depending in \_\_\_\_\_ between the said A B and C D, depends on the testimony of A W, who is a single witness to that fact. Given &c.

*(D) Notice to take depositions.*

To Mr. C D.

Please to take notice, that on the \_\_\_\_\_ day of \_\_\_\_\_ next, between the hours of \_\_\_\_\_ in the morning, and \_\_\_\_\_ in the evening of the same day, at the house of \_\_\_\_\_ in the county of \_\_\_\_\_ I shall proceed to take the deposition of B W, who is a witness for me in a cause now depending in the court of \_\_\_\_\_ in which I am plaintiff, and you are defendant. A. B.

✍ If the deposition be to be taken in another state, the notice must so express it.

*(E) Notice of an application to court, to strike commissioners, to take the deposition of a witness residing out of the state: on 1 Rev. Code, ch. 141, sect. 13, p. 279.*

To Mr. A. P.

Please to take notice, that on the \_\_\_\_\_ day of the next (county or circuit) court to be held for the county of \_\_\_\_\_ I shall apply to

the said court to strike commissioners, for the purpose of taking the deposition of B W, now residing in the state of \_\_\_\_\_ (or, if in a foreign country, express it) who is a witness for me in a suit now depending in the said court of \_\_\_\_\_ wherein you are plaintiff, and I am defendant.

I am y<sup>r</sup>s, &c.

C D.

(F) *Affidavit of the service of notice, to take depositions, or strike commissioners.*

county, to wit.

This day A B, of lawful age, made oath before me, a justice of the peace for the county aforesaid, that on the \_\_\_\_\_ day of \_\_\_\_\_ in the year \_\_\_\_\_ he delivered to the within named C D a true copy of the within notice. Given under my hand, this \_\_\_\_\_ day of \_\_\_\_\_ in the year \_\_\_\_\_

☞ If the copy of the notice be delivered to a "free white person above the age of sixteen years, who is a member of the family of such person, and who is informed of the purport thereof," or, "left at some public place, at the dwelling house, or other known place of residence of such person," it should be so expressed; and state with *what person, by name*, it was left; and also that he or she was above the age of sixteen years, a member of the family, and that he or she was made acquainted with the purport of the notice. See 1 Rev. Code, ch. 76, sect. 42, p. 113.

## WOLVES.

REWARDS for killing wolves were very early introduced in Virginia. The first law we meet with on the subject passed in the year 1632. By that act, it was made penal to kill wild hogs, without licence from the governor; but, as a reward for killing wolves, every person who killed a wolf, and brought in the head to the commander of the plantation, was permitted to kill one wild hog, and take the same to his own use. (See *Stat. at Large*, vol. i. p. 199.) Afterwards a reward of one hundred pounds of tobacco was levied on the county, for each wolf killed (See 1 vol. *Stat. at Large*, p. 328.); which reward, by a subsequent act, might be increased, at the discretion of the county court (*Ibid.* p. 456.); and Indians were to be employed by the court to kill them. (*Ibid.* p. 457.) Various laws, under different modifications, prescribed rewards for killing wolves. (See 2 vol. *Stat. at Large*, Index, tit. "Wolves.") As the population of the country increased, and these animals became less injurious in the old settlements, the rewards were confined to particular counties. The subject was at length taken up by the legislature, who,

from time to time, fixed rewards in different counties, in some more, in some less, according to the wishes of the inhabitants. By an act of 1798 (*see 2 Rev. Code, App. No. 9. p. 136.*) a general reward of two dollars for each wolf above six months old, and one dollar for every wolf under that age, was allowed; to be paid by the county, and repaid by the public; which is the same in principle, as the act of 1748. (*See L. V. edit. 1769, p. 278.*) But by act of 1805 (*2 Rev. Code, ch. 77, p. 106.*) all laws which provided that the rewards which were paid by the counties should be repaid by the public were repealed.

After the general assembly had legislated on the subject for many years, by increasing or reducing the reward for killing wolves in different counties, an act was at length passed, which gave the county courts nearly the same powers which they possessed under the act of March, 1657-8. *See 1 vol. Stat at Large, p. 456.*

By an act of 1809 (*Sess. Acts, ch. 5, p. 6.*) it is enacted, that it shall be lawful for the courts of every county wherein it may be thought expedient to do so, a majority of the acting magistrates of the county concurring therein, to allow such reward for killing old or young wolves, as in their opinion the necessity of the case may require, to be levied and paid in the respective counties allowing the same, in like manner as other county charges are annually levied and paid, the party or parties entitled thereto producing a certificate thereof to the court laying the county levy, obtained in the manner required by this act: *Provided always*, that not more than twelve dollars shall be allowed by the said courts for each wolf scalp, as the case may be.

Sect. 2. Every person claiming such reward shall produce the whole skin of the head of every wolf to a justice of the peace of the county in which the same shall have been killed, and shall then also, before the same justice, make oath or affirmation to the effect following, that is to say, "*I, A B, do swear, that the scalp or scalps (as the case may be) by me now produced, was or were taken from a wolf or wolves caught and killed by me in the said county of So help me God.*" And thereupon the justice shall grant to the wolf killer a certificate, reciting his name, the number of scalps produced, either of wolves, or such as in his opinion appear not to exceed six months, the time and place when and where killed, and that oath or affirmation, or other sufficient proof thereof, hath been made before him, which, being produced to the courts laying the levies of the said counties, shall entitle the party or parties therein mentioned to such reward as the court in their discretion may think proper to allow; but no claim or demand for the same shall be allowed without such certificate: *Provided always*, that every justice of the peace shall cause the ears of all wolf scalps brought before him to be cut off in his presence, and he shall not grant a certificate for any scalp without ears.

### *Certificate of a magistrate.*

county, to wit.

This is to certify, that W K, of \_\_\_\_\_ did, on this day, produce to me \_\_\_\_\_ wolf scalps, which appear to me to be the scalps of \_\_\_\_\_ and wolves (or, of wolves not exceeding six months old; or, \_\_\_\_\_ of

*which appear to be scalps of old wolves, and of wolves not exceeding six months old, as the case may be*) and that it was proved before me, by the oath of the said W K (or, of A W, as the case may be) that the wolf (or, wolves) from which the said scalps were taken, were caught and killed by the said W K, on the day of in the said county of . Given under my hand &c.

## WOMEN.

OF women, considered as *wives*, or *feme covert*s, see title "WIFE;" having two husbands, or men two wives, see title "BIGAMY;" benefit of clergy, see title "CLERGY;" the ravishment of women, see title "RAPE."

By *Virginia laws*, 1 *Rev. Code*, ch. 104, p. 196, sect. 19, it is made felony to take away against her will, and marry or defile any woman, having substances in goods moveable, or lands and tenements, &c.

Sect. 20 If any person above the age of fourteen years take away any maiden or woman child unmarried, being within the age of sixteen years, from the possession of and against the will of the person lawfully having the possession of her, he shall be imprisoned for any term not exceeding two years.

Sect. 21. To take away and deflower any such maiden as last aforesaid subjects the offender to five years imprisonment, without bail or mainprise.

Upon the statute of 3 H. 7, from which our act of assembly is taken, the following observations have been made: 1. That the maid, wife, or widow, have lands, or tenements, or moveable goods, or be an heir apparent. 2. That she be taken away against her will. 3. That the taking was for lucre. And, 4. That she be married to the misdoer, or to some other by his consent; or be defiled (that is, carnally known.) For if these concur not, and be so laid in the indictment, the misdoer is not a felon within the statute, but otherwise to be punished. 3 *Inst.* 61. *Haw. B.* 1, ch. 42, sect. 4, 5.

It is no manner of excuse, that the woman at first was taken away with her own consent; because if she afterwards refuse to continue with the offender, and be forced against her will, she may from that time as properly be said to be taken against her will, as if she had never given any consent at all; for till the force was put upon her, she was in her own power. *Haw. B.* 1, ch. 42, sect. 6.

Also it is not material, whether a woman, so taken contrary to her will, be at last married or defiled with her own consent or not, if she were under the force at the time. *Ibid.* sect. 7.

In *Fulwood's* case, it was resolved, that the woman taken away and married may be sworn, and give evidence against the offender who so took and married her, though she be his wife, *de facto*. 1 *Hale* 661.

And this statute has been held to extend to a natural daughter. *Str.* 1162.



A woman quick with child, and condemned for treason or felony, shall have execution respited till her delivery; and to ascertain the fact, the sheriff shall be commanded to impanel a jury of matrons to try and examine her; but she shall have this privilege but once. *Haw. B. 2, ch. 51, sect. 9.*

## WRECKS.

**WRECK** of the sea, in legal understanding, is applied to such goods, as, after shipwreck at sea, are by the sea cast upon the land, and therefore the jurisdiction thereof pertaineth not to the admiralty, but to the common law. 2 *Inst.* 167.

None of those goods which are called *jetsam* (from being cast into the sea, while the ship is in danger, and which there sink and remain under water) or those called *flotsam* (from floating on the surface of the water) or those called *ligan* (which lie in the bottom of the sea, but tied to a cork or buoy, in order to be found again) are to be esteemed wreck, so long as they remain in or upon the sea, and are not cast upon the land by the sea; but if any of them are cast upon the land by the sea, they are wreck. 1 *Bl. Com.* 292.

The humane provisions of the laws of Virginia, on the subject of wrecks, would, if duly executed, effectually relieve the distresses of a class of our fellow beings, who are too often the prey of a set of vultures, in the shape of man, at a time when every dictate of religion and morality calls aloud for the exercise of the best feelings of the heart.

The act on this subject is as follows:

Whereas many vessels have been, and may hereafter be, stranded on the sea-coast, bay or river shores, within this commonwealth, and the goods or other property belonging to such vessels may be embezzled and stolen, to the great injury of the owners: For remedy whereof, *Be it enacted by the General Assembly*, That it shall be lawful for the governor, with advice of council, and he is hereby required, to appoint and commission two discreet persons in each of the counties bordering on the sea or bay shores in this state, whose business and duty it shall be, on the earliest intelligence, or on application to them made by or on behalf of any owner or commander of a ship or other vessel, being in danger of being stranded, or being stranded, to command any constable or constables, to be appointed by them for that purpose, nearest the coast where such ship or vessel shall be in danger, to summon as many men as shall be thought necessary to the assistance of such ship or vessel; and if there shall be any ship or vessel belonging to the state riding near the place, the commissioner or commissioners shall have power to demand of the commanding officer of such ship or vessel assistance by their boats and such hands as they can conveniently spare; and if any commanding officer shall neglect to give such assistance, he shall forfeit one hundred pounds, to be recovered by the

officer or owner of the ship in distress, with costs, in any court of record within this commonwealth. The commissioner or commissioners, and the commanding officer of any ship or vessel, and all others who shall assist in preserving any ship or other vessel in distress, or their cargoes, shall within forty days be paid a reasonable reward by the commander or owner of the ship or other vessel in distress, or by the merchant whose vessel or goods shall be saved; and in default thereof, the vessel or goods shall remain the custody of the commissioner or commissioners until all charges be paid, or security given for that purpose, to the satisfaction of the parties. And in case the parties shall disagree touching the monies deserved by the persons employed, it shall be lawful for the commander of such vessel saved, or the owner of the goods, or merchant interested, to choose one indifferent person, and also for the commissioner or commissioners to nominate one other indifferent person, who shall adjust the *quantum* of the gratuities to be paid to the several persons, and such adjustments shall be binding on all parties, and to be recoverable with costs in any court of record within this commonwealth, by action on the case. If no person shall claim the goods saved, the commissioners, or one of them, shall take possession thereof, and cause a true description of the marks, numbers and kinds of such goods, to be advertised four weeks in the *Virginia Gazette*; and if no person shall claim the same within three months, public sale shall be made thereof (but if perishable, the goods shall be forthwith sold) and after charges deducted, the residue of the money, with an account of the whole, shall be transmitted to the treasurer, who shall keep an account of the same, for the benefit of the owner, who, upon proof of his property to the satisfaction of the auditor, shall upon his warrant receive the same. If any person, besides those empowered by the commissioners, or one of them, shall enter or endeavour to enter on board any vessel in distress, without the leave of the commanding officer, or in case any person shall molest them in saving the vessel or goods, or shall endeavour to hinder the saving such vessel or goods, or shall deface the marks of any such goods before they be taken down in a book by the commissioners, or one of them, every such person shall forfeit and pay the sum of ten pounds, to be recovered with costs, by information in any court of record within this commonwealth, and applied to the use of the owners of the vessel or goods, as the case may be; and in case of failure to pay such forfeiture immediately, or giving security to pay the same within one month, he, she, or they, shall receive ten lashes on his, her, or their bare back, by order of such court. It shall be lawful for any commanding officer of a vessel in distress, or the commissioners, to repel by force any persons as shall, without consent as aforesaid, press on board any vessel in distress, and thereby molest them in preserving the vessel or goods; and in case any goods shall be found upon any person that were stolen or carried off from any vessel in distress, the person upon whom such goods be found shall, upon demand, deliver the same to the owner or commissioners, or to such other persons as shall be authorised by the commissioners or owner to receive such goods, or shall be liable to pay treble the value, to be recovered, with costs, in any court of record. If any person shall make, or be assisting in making a hole in any vessel in distress,

## WRECKS.

shall steal any pump, materials, or goods, or shall be aiding in stealing any pump, materials, or goods, from any vessel, or shall wilfully do anything tending to the immediate loss of such vessel. such person shall be guilty of felony, and suffer death without benefit of clergy; any commissioner, by fraud or wilful neglect, abusing the trust reposed in him, shall, upon conviction thereof, forfeit and pay treble damages to the party aggrieved, to be recovered, with costs, by action on case, in any court of record, and shall thenceforth be incapable of acting as a commissioner. Any constable, or person summoned by any commissioner, refusing or neglecting to give the assistance required for the saving of any vessel, or her cargo, shall forfeit and pay twenty-five pounds, to be recovered before any justice, by the commissioners ordering the duty; and shall be moreover subject to the payment of the same damages, and to be recovered by the party aggrieved in the same manner, as in the case of a commissioner. The commissioners shall set up a copy of this act once in every year in each of the counties of the counties wherein they respectively reside.

*Provided always, and be it further enacted, That the commissioners appointed by virtue of this act shall respectively give bond with security in the court of the county where he resides, in the sum of one thousand pounds, for the due and faithful execution of his office, and that it shall not be lawful for such commissioners, or any of them, to enter upon the duties of his office before he gives bond and surety as aforesaid.*

*[I. And be it further enacted, That where any vessel shall be wrecked and totally lost, goods saved from the wreck shall be liable to duty and duties; but if any vessel be drove or cast on shore, and the damage sustained on the goods does not appear to exceed ten per cent., in the judgment of the commissioners, such goods shall be duly appraised with the naval officer nearest the place where the case happened, according to law. [The power of regulating commerce being reserved in Congress, under the constitution of the United States, this section is no longer obligatory.]*

*Warrant against a constable, or others, for refusing assistance to a vessel in distress.*

county, to wit.

Whereas information hath been given to me, by A W, a commissioner of wrecks for the county of \_\_\_\_\_ that B C, a constable of said county, who had been duly appointed for that purpose (or, *E who had been summoned for that purpose by B C, a constable &c. as case may be*) did, on the \_\_\_\_\_ day of \_\_\_\_\_ last past, refuse to give his assistance in saving a vessel and her cargo, then lying and being stranded on the sea shore, at the said county, near to \_\_\_\_\_ these are therefore to require you to summon the said B C to appear before me, or some other justice of the peace for the county aforesaid, at \_\_\_\_\_ on the \_\_\_\_\_ day of \_\_\_\_\_ to shew cause why the penalty imposed by law, in such cases, should not be imposed on him for his said offence. Given under my hand, at the \_\_\_\_\_

county of \_\_\_\_\_ this \_\_\_\_\_ day of \_\_\_\_\_ in the  
year \_\_\_\_\_

To \_\_\_\_\_ to execute.

 For the forms of the judgment and execution, see title WAR-  
RANTS.

## ADDENDA.

(No. 1.)

[SINCE the foregoing work was put to press, the following important case has been *finally* decided in the superior court of chancery, for the Richmond district, and has been very obligingly furnished to the author by the chancellor, Creed Taylor, esq. As this case settles the *principles* upon which alimony may be decreed by a court of chancery, and discloses the *practice* to be pursued, where the defendant resists the authority of the court, an insertion of the whole case, from its commencement to its termination, it is presumed, will be acceptable.]

*In the superior court of chancery, for the Richmond district, Fall Term, 1809.*

### ANN PURCELL *vs.* CHARLES PURCELL.

The bill in this case was filed to obtain *alimony* : it stated the marriage of the parties many years ago in New Jersey, in the United States ; and that, without any impropriety of behaviour on her part, he had separated himself from her, without affording to her any support ; that with all her endeavours she had often been without the necessaries of life ; and his knowledge of the fact, instead of exciting even compassion, had caused only contempt and insult ; that she had been frequently compelled to depend upon *charity* for subsistence, while he enjoyed a very considerable estate real and personal : wherefore she prayed for an adequate support, and for general relief.

In support of the allegations of the bill, there was the following proof :

1. William Richardson swore, that in 1786, he was living in Philadelphia, a near neighbour to some of Mrs. Purcell's connections, and occasionally visited them : that two of them, Mrs. Duncan and Mr. Henry were both persons of wealth, and high respectability ; that he often heard them express their sorrow at the marriage of their niece and cousin Ann, to Charles Purcell, from apprehensions that he would not make a good husband ; that in 1787 or 1788, the deponent was in Richmond, and among others, became a boarder at the house of Charles Purcell, and that he did believe the said Ann to be the lawful *spouse* of the said Charles Purcell.

2. Minton Collins swore, that he had been acquainted in the family of Charles Purcell about twenty years ; that during the whole of his

acquaintance, Mrs. Purcell was treated by the said Charles Purcell very affectionately, and that he did always believe she was his lawful wife, as she was introduced as such to the acquaintance of many genteel families in this city.

3. Col Robert Gamble swore, that in the year 1790, before he had removed to Richmond, but while he and Mrs. Gamble were on a visit to that place, Mrs. Purcell was introduced to Mrs. Gamble, by Mrs. Sampson Matthews, and several other ladies; that the deponent soon afterwards removed to Richmond, and from the spring of 1791, until the summer of 1798, he and his family were neighbours to Charles Purcell, during which time their families reciprocally interchanged the accustomed civilities; that the plaintiff and defendant lived apparently as man and wife; that he had seen Mrs. Purcell at the city assemblies or balls, and that reputable families were in the habit of visiting Mr. and Mrs. Purcell at their own house; that the deponent was called upon by the said Charles, to unite with col. Lambert, to take his wife's privy examination, which they did; and that the said Charles always called the plaintiff Mrs. Purcell.

4. Col D. Lambert swore, that at the request of Mr. Charles Purcell, he, with col. Gamble, waited on the said Ann, at the house of the said Charles, on the eleventh of February, 1792, and took her relinquishment of dower in some real estate conveyed by them; and that he always understood and believed that the said Ann was the wife of the said Charles Purcell, until, lately, it had been otherwise hinted by the said Charles Purcell.

5. There was the certificate of the clerk of the Hustings' court of the city of Richmond, which stated, that the privy examination and relinquishment of dower, by the plaintiff, as stated by col. Gamble and col. Lambert, had been returned and duly recorded.

6. Besides, there were *seventeen* letters filed; three dated in 1794, 1798, and 1804, from their friends and connections in Ireland, one directed to Mr. Charles Purcell, jeweller, Richmond, and the other two to Mrs. Ann Purcell, to the care of Mr. Charles Purcell, making the most friendly inquiries after them and their children; two others of a most affectionate character, dated June and July, 1790, addressed by him to her, by the name of Mrs. Ann Purcell, while she was on a visit to her friends in Philadelphia; ten others of a like character, dated in 1799, 1800, 1801, 1802, and 1803, addressed by him to her by the same name, while she was in New Kent, at Mr. Andrews' in Norfolk, and in Baltimore; one other addressed to Mr. Charles Purcell, by Mr. Pauley, at whose house she had been accommodated, at the instance of the said Purcell, inclosing his bill, dated July, 1802; and one other from Charles Purcell, dated Richmond, July, 1804, in which he, for the first time, *denounced*\* her; but advised her to go to her brother's, and as he might find it convenient, he would give her some assistance.

Upon the bill, and the evidence aforesaid, the plaintiff, by council, at February term, 1808, moved for *alimony pendente lite*; when the

\* It was said at the bar, and not denied, that about this time he had formed a connection with another woman.

defendant, by council, asked leave to take the papers, in order to file his answer, which was granted.

The answer was filed the next day; it positively denied the marriage; and stated, that in April, 1786, he had joined a boating party with the plaintiff and several others. and had taken a trip to the Jerseys; and that soon afterwards she voluntarily embarked with him for Richmond, where he acknowledged they had passed as man and wife; that the relinquishment of dower was taken more to satisfy those interested in the purchase money, than for any other purpose; that he then denied the marriage; that in August, 1797, a young lady from Ireland was introduced to him, by the name of Ann Church, by Robert Means, as the niece of the plaintiff, whose expences the defendant paid; but, in a short time, Ann Church proved to be an illegitimate daughter of the plaintiff; that, notwithstanding this, he educated her, and, upon her marriage, gave her a house and lot in the city of Richmond; but then declared, that it was done for the respect which he once had for the said plaintiff; that in 1798, when his houses were consumed by fire, he was obliged to rent a house, to which he removed; but the plaintiff thought proper to accept of the invitation of her friends, and not to go with him; that, shortly after, she, of her own accord, without his knowledge, extended her visits to the borough of Norfolk, Lynchburg, Williamsburg, Baltimore, and other places, which he admitted she had a right to do; that in 1800 and 1804, she was in Richmond, and continued there for some time, without returning to him or asserting any demand against him; but still he did afford her some aid; but declared it was from *charity*, and not from any *obligation* that he was under; that if she had been his wife, which he denied, yet her departure from him, and her manner of living afterwards, would be a bar to any claim of *dower*, if he were to die, and should be of course to *alimony*; and that if they were married, she could say where the marriage ceremony was performed, the clergyman, and the persons or some of them who were present; and in support of this answer, he filed the following proof:

1. The affidavit of James Miller, in which he stated that he had understood, from the plaintiff, that she and the defendant were married in Philadelphia.

2. The affidavit of John Sedwich, in which he stated, that about December, 1807, he understood from her, that she was married, in Philadelphia, to Charles Purcell, but that she did not then wish to live with him, as his wife; but merely to recover of him as much money as she could; and at another time she said, they were married in the Swedish church in Philadelphia, and that he, the deponent, replied, then you can get a certificate of your marriage; but she said, that they kept no record of marriages, and that after they were married, he left her at her aunt's door, and that he had no other knowledge of her until they embarked for Richmond.

3. The affidavit of Robert Cowan, in which he stated, that in 1803 and 1804 a person by the name of Mrs. Purcell was at Norfolk, and lived with Jeremiah Andrews, while his wife was in England; and that people spoke freely of Mrs. Purcell on that account; and that as soon as Mrs. Andrews returned, Mrs. Purcell was discharged.

4. The cross-examination of col. Gamble, which had no bearing on the question.

And thereupon the plaintiff renewed her motion for *alimony pendente lite*. To which the counsel for the defendant objected :

1. Upon the ground of *jurisdiction* : and,
2. For the want of *sufficient* proof of the marriage.

*By the chancellor.*

If the jurisdiction of this court were now to be settled upon English precedents, there might be some doubt about the question, from the cases, as brought into one view, by Mr. Fonblanque ; but I shall leave this clashing of English judges to be reconciled among themselves, and take up the question upon first principles.

I hold, that in every well regulated government there must somewhere exist a power of affording a remedy where the law affords none ; and this peculiarly belongs to a court of equity ; and as husband and wife are considered as one person in law, it is evident, that in this case the law can afford no remedy ; which is universally admitted to be a sufficient ground to give this court jurisdiction ; and therefore it must entertain the bill, if there be sufficient proof of the marriage.

The standing rule in equity is, that an answer is not evidence in favour of the defendant, unless it be responsive to the bill ; and therefore, whatever the answer asserts *affirmatively*, in opposition to the plaintiff's demand, must be proved by indifferent testimony ; apply this rule then to the case before me, and the result will be, that the plaintiff must prove her marriage with the defendant, since he has denied it by his answer, and he must prove the other matters set out in his answer, as not being responsive to the bill ; that is to say, he must prove 1st, the circumstances which he states with respect to the relinquishment of her dower ; 2d, that he then denied the marriage ; 3d, that Ann Church was the natural daughter of the plaintiff (if he, or his counsel, supposes that to make out these points would be of service) ; 4th, that she refused to live with him in 1798, in the rented house ; and 5th, that her manner of living, while she was from him, was unlike an upright woman ; or, if it is intended to charge her with living in *adultery*, it must be proved by him.

Thus, having stated what devolves on each party to prove, I will next examine the proof of the marriage, since it seems to be admitted on all hands, that if they were married, he must allow to her *alimony* : and I confess, upon this point, I do not perceive any ground on which to rest a doubt : evidence of a like description, coming from him under like circumstances, of the most atrocious crime that he could commit, would be sufficient to take his life ; and yet, we are told, it is not sufficient to fix one of the most honourable acts in society upon him ; namely, that he was *married* ! lest it should draw from him an annual support for his wife ! and it was contended with great zeal and confidence, that there must be proof of an *actual* marriage, and that the defendant's *confession* of the fact, though attended with all the present circumstances, was not sufficient ; and in support of this, one solitary case was produced, of *Miller v. Morris* (4 *Barr.* 2057) which was an action for criminal conversation with the plaintiff's wife, which certainly bears no analogy to this case, and, if it proves any thing, proves

that evidence like that, which is now before the court, may be admitted in all cases, but in prosecutions for *bigamy* and *crim. con.* for this plain reason, that a *crime* shall not be fixed upon one, but by the *highest evidence*; but the *virtuous* act of *matrimony* may, in this case, as in many others, be proved by *cohabitation, name, reputation, and other circumstances*. The marriage then being fixed beyond any doubt, in my mind, it remains only to be inquired into, whether at this stage of the cause the defendant has fixed so much *blame* on his wife, as that she should not have *alimony pendente lite*. The rule as before laid down with respect to the answer being evidence, must not be overlooked; and the defendant must prove his affirmative matter contained therein. But not one tittle of his proof supports the circumstances under which he states the dower to have been relinquished, or that he then denied the marriage, or that Ann Church was the natural daughter of his wife, or that she refused to live with him in 1798, or that she conducted herself improperly abroad: and the whole of the correspondence before stated proves that these things, so far as they were noticed in it, were not true; and this brings me to his evidence.

1. James Miller's affidavit states, that she said they were married in Philadelphia; but what does this prove? It may be a misapprehension on his part; and I am inclined to think it was.

2. As to the proof by John Sedwich, it is clear upon the face of his affidavit, that he was holding an unauthorised conversation with her, *if indeed he held one at all*, and that she was not bound to satisfy him about it; but if she did, is it not very likely, from the contiguity of Philadelphia, the Delaware, and the Jerseys, that names were mistaken or misapplied? and if so, then the evidence produced against her, as coming from herself, should not be garbled; and taken altogether, would fix the marriage. And,

3. If any one shall be disposed to indulge his suspicions, because of the evidence of Robert Cowan, I would recommend it to such person to read the *letters* of the defendant, addressed to the plaintiff while she was in Norfolk, at the house of Mr. Andrews; upon the whole I do not discern any cause of complaint against the conduct of Mrs. Purcell, and she must be allowed *alimony pendente lite*.

Whereupon the court then made an order to this effect, that the defendant should pay to the next friend of the plaintiff for her maintenance, quarterly, the sum of seventy-five dollars, pending this suit, to commence from the first of January, 1808, until the further order of the court; unless the defendant should shew cause to the contrary before the judge in vacation, on the twentieth of March next.

The defendant then filed a cross bill against the plaintiff by the name of Ann Hazleton, and alledged therein that he never was married to her, and called on her to say, on oath, if they ever were married? and if they were, where did it take place? what was her name? who performed the ceremony? who were present when the ceremony was performed? where did they first become acquainted? were they married in a church, or in a private house? if the former, what church? if the latter, whose house? who were present, and where did they reside?

To this bill the defendant answered, that they *were* married, and that she is the wife of the said Charles Purcell; that their first acquaintance was at the house of a Mr. Reynolds, of Philadelphia, a seal-cutter



and engraver, in the fall of 1785 : that at the time of their intermarriage she bore the name of Ann Hazleton : that on the 10th April, 1786, they, and Mr. and Mrs. Emery, and a Miss Heizlar, took a boat at Walnut-street wharf, and went over to the New-Jersey shore, where they were met by a man, whom the said Charles asserted, and she believed, was a clergyman of the Swedish congregation in Philadelphia, and then and there the ceremony was performed, in the presence of those persons : but where they reside now she cannot say ; and then they returned to Philadelphia ; and in a few days afterwards, on their way to the vessel which was to take them to Richmond, they met with Mr. John Collins, to whom she was introduced by the said Charles as his wife ; and the said Collins then introduced her to the father of Mrs. Collins, who is now Mrs. H. Dabney, of Richmond : that on their arrival in Richmond, they were very kindly received, and Mr. Waddell gave up his own room to them : and she referred to several respectable people, to prove the unvaried acknowledgments of the said Charles that she was his wife.

And now by consent of parties these causes came on to be heard together, and were submitted without further argument.

*By the chancellor.*

The only difference that I find between the record now, and when it was formerly before me, is in a cross bill and answer : surely if there was any room before to doubt about the marriage of these parties, the answer to the cross-bill must now be considered as freeing the case of all such doubt ; for the answer being responsive to the bill, is good evidence in her favour : and monstrous indeed would be the state of that society, which would admit a man, as, for example, Charles Purcell, to bring a woman from another country, and to introduce her here, among his friends, as his wife ; live with her for many years, as his wife ; treat her as his wife ; convey real estate, and have her relinquishment of dower taken, as his wife ; address to her letters, as his wife, and not compel him to maintain her, as his wife, *unless she was in fault* ; because *he says* he was not married to her ; but this declaration cannot be believed : they both agree as to the trip to the Jerseys, and as to the time when it was made, but she gives the account of the marriage, in answer to one of his interrogatories, and therefore he must stand concluded upon that point : it may be that he practised a fraud upon her, and that the Swedish man was not a clergyman ; yet, it was done by the means of Charles Purcell, and not by Ann Hazleton ; and I will, under all the circumstances of this case, hold him to it. The rule of law is, that in a controversy touching the validity of a marriage, as whether a marriage or not, no *alimony* is due until *some* matrimonial proof appear, or that it doth some way *constare de matrimonio* ; but wherever a marriage doth appear, unless the wife be in fault, there *alimony* shall be due. *God. repr. can.* 310, and in a book entitled "*Praxis in foro Ecclesiastico*," title 35, p. 40, as translated by Mr. Warden, the rule in England was, when a suit was brought in the ecclesiastical court by a wife against her husband, the judge first ascertained the marriage, which he did either by the answer of the proctor, or of the principal party, or by testimony ; all of which has been done in this case.

The correspondence shews that the plaintiff left the defendant, at his instance, and for his accommodation, after the fire in 1798; that in 1799 he boarded her at Mr. Pauley's, in New-Kent; that in 1802, when she left Mr. Pauley's, she went to Mr. Andrew's, in Norfolk; that he, the defendant, afterwards wrote to her, stating that she must not return, and advised her, that if Mr. Andrews could not board her, to get him to provide her with board in a private house by the year, payable quarterly; and promised to send her some money in a short time; in 1803 he wrote to her again, and among other things stated, that he had sent Mr. Andrews three kegs of butter, and begged of her to be useful in his family, gave an account of his prospects, and assured her she should not want while he could command a shilling; in fact, it seems that she was kept off by his means, that he might recover from his embarrassments, and that when she conceived he had done so, and insisted upon her right to return, then for the first time he *denounced* her as the most unworthy of her sex. Upon this view of the case, and upon the ground of public convenience, as well as of that respect which is due to the matrimonial state, Charles Purcell should be considered as the husband of the plaintiff, and bound to afford to her a reasonable maintenance. The allowance, *pendente lite*, was made without any particular information with respect to the value of his property; and therefore the court gave him a day to shew cause against it; if cause had been shewn, and the allowance had been too much, an injunction could have been granted to the excess; but as no cause was shewn, the allowance was deemed reasonable; and at an after day, when the parties were willing to bring on the cause, the court thought it best, under all the circumstances of the case, to refer it to a commissioner, to ascertain the value of his property, that only a reasonable annual allowance might be made, that should be suitable to their station in life, for which purpose he was ordered to attend commissioner Ladd; but although this was for his benefit, it was answered in his name, by a letter to the commissioner, that the order was an unconstitutional attack on the liberty of a free citizen of Virginia, in terms and language very different from his letters addressed to Mrs. Purcell, which induces a belief that he was advised to this course, and was not in fact the author of the letter addressed to the commissioner; and if that was the fact, and his adviser were known to the court, if he should not have cause to regret it, the court would not. The commissioner however proceeded, and made a report upon the best information he could get, and reports the value of Purcell's property to be \$ 29,800; but as it does not seem to be a very productive estate, and \$ 75 quarterly was thought sufficient, the court will take that sum for its guide now, and fix the annual allowance at \$ 300, with liberty however to each party to apply to the court, to increase it, or to diminish it, as circumstances may in future make it proper. This is as much as, I think, the court can do. But, the plaintiff's counsel supposed that the court would set apart a third of the defendant's estate; but I suppose not; for the husband, though bound by every legal and moral principle to afford to his wife a support, yet if, in violation of these obligations, he becomes base enough to cast her off without any *just cause*, all, I apprehend, that can be imposed upon him is a suitable maintenance, which may be varied according to circumstances, and which should not con-

tinue longer than he is willing to restore her to the comforts of bed and board, and to give satisfactory assurances for her enjoyment thereof, which, if she should refuse, the allowance made for her support would, at his instance, be taken away ; and if she were to survive him, she would be entitled to dower, and her *alimony* would of course cease. This is the opinion of the court, conformable to which Mr. Randolph may draw a decree.

The decree was to this effect :

That the defendant in the first suit should annually, on the first day of October, pay to the plaintiff \$3.00 for her maintenance, until he shall restore her to the comforts of her bed and board, and give satisfactory assurances for her enjoyment thereof ; that on the 1st October next the quarterly allowances are to cease ; and liberty was reserved to each party, at any time, to apply to the court, to have an increase or diminution of the said annual allowance, as circumstances may in future make it proper ; and the cross bill was dismissed ; and it was ordered that the costs of both suits be paid by the said Charles Purcell ; who by counsel prayed an appeal ; which the court said he might have in the last suit, if he asked, upon the usual terms ; but in the first suit the appeal was refused, for these reasons :

1. Because he had not made any of the quarterly payments, and was under a commission of *rebellion* :

2. Because the decree was not final, and the appeal was at the discretion of the court ; but the *chancellor* said, that if Charles Purcell would come in, and *free his contempt*, by paying up the arrears, and give security for the support of his wife pending the appeal, it should be granted ; but his counsel said that he would not do it ; and the *chancellor* said, the appeal should not be allowed ; and he added, that he had the highest authority in support of the principles which he had laid down, to wit : the universal sense of the country, as declared every day, with great propriety, in such cases in the county courts, and in no instance had an appeal from their decisions ever been taken, which proved, that where they acted, they had done right, and with which the people were perfectly satisfied.

After the decision of the above case by the chancellor, the defendant's counsel made application to the judges of the court of appeals, for leave to carry up the case to that court, by appeal, which they *unanimously* refused, and expressed themselves perfectly satisfied with the decree upon the merits ; so that the doctrine of *alimony* may now be considered as settled. [See THE ENQUIRER of Dec. 12, 1809.]

The *principle* having been settled, that the decree for alimony was rightly pronounced in this case, the following proceedings, to carry that decree into effect, have taken place in the court of chancery :

February 19th, 1810. The defendant was brought into court, under commission of *rebellion*, and, refusing obedience to the former orders of the court, was ordered to be forthwith committed to the jail of Henrico county.

February 27th, 1810. A writ of *habeas corpus*, on the motion of the defendant's counsel, was directed to the sheriff of Henrico county,

to bring the defendant up: because it was stated to the court, that he was now ready to do that which was required of him.

*February 28th, 1810:* The defendant was brought into court, under the writ of *habeas corpus*, awarded yesterday, and stated his willingness to do any thing which the court should order, that he might be discharged:

And it was ordered, that upon executing a note, for all the arrears due to the plaintiff, under the several orders of this court, negotiable at the bank of Virginia, payable to the next friend of the plaintiff, with such endorsers as *Edmund Randolph*, Esq. the counsel of the plaintiff, should approve; and also entering into bond in the penalty of \$ 4,200, with such security as he should also approve, conditioned to perform the decree of this court, heretofore pronounced, that the *commission of rebellion should be superseded*, and the defendant discharged out of custody.

N. B. The security was given in the last instance, and the money paid in the first; and the defendant thereupon discharged.

## ADDENDA. (No. 2.)

[The following orders, in the case of writs of *Ne exeat*, and *injunctions* thereupon, will shew the practice in the superior court of chancery for the Richmond district.]

## WOODSON vs. GIBSON.

13th Oct. 1806.

Let the writ of *ne exeat* issue according to the prayer of the bill; and also to restrain the defendant from the removal of his property beyond the limits of this commonwealth, until he shall enter into bond, with approved security, in the penalty of five thousand dollars, to abide the decree of the court in the premises: the plaintiff is also to give bond, with like security, in the like penalty, with the usual condition, in such cases: the plaintiff states that the property of the defendant lies in the counties of Cumberland and Prince Edward. A writ may therefore be made out for each county, to be suspended until the bond and security required of the plaintiff shall be deposited with the clerk or judge of this court.

CREEB TAYLOR.

(a copy) teste,

P. TINSLEY, *Cik.*

## ADDENDA. (No. 3.)

*In the superior court of chancery, February 7, 1809.*

## TINSLEY &amp;c. vs. SYDNOR &amp; al.

On motion of the plaintiffs, by counsel, and for good cause shewn, a writ of injunction is awarded them to restrain the defendants from removing, or causing to be removed or sent out of the limits of this commonwealth, until the further order of this court, the negro slaves in their possession respectively, mentioned in the bill to have been de-

vised to the defendant *Anne Sydnor* for life, by her former husband, *John Thompson*; that is to say, *Will*, a man, *Frankey*, *Jenny*, and *Judy*, women, in possession of the said defendant *Anne*, *Billy*, a tanner, in possession of the defendant *Edward G. Sydnor*, *Kate*, or *Katy*, in possession of the defendant *John Seabrook*, *Jerry*, and a woman named *Frankey*, in possession of the defendant *John A. Richardson*, and *Jack* and *Henry*, two small boys, and *Polly* and *Katy*, girls, in possession of the defendant *James W. Matthews*: And the court doth order, unless the defendants shall severally enter into bond, with sufficient security, the said *Anne Sydnor* in the penalty of four hundred pounds, the said *Edward G. Sydnor* in the penalty of two hundred pounds, the said *John Seabrook* in the penalty of two hundred pounds, the said *John A. Richardson* in the penalty of three hundred and fifty pounds, and the said *James W. Matthews* in the penalty of three hundred and fifty pounds, with condition to abide the final decree in this cause, that the sheriff of the county, or the sergeant of the corporation, in which the said negroes may be found, take possession of them, and keep them, until such security be given, or until the further order of the court to the contrary: but the plaintiffs are not to have the benefit of this order until they shall enter into bond, with sufficient security, in the penalty of fourteen hundred and fifty pounds, conditioned for paying to the defendants all damages and costs which they may sustain by the suing out of the process hereby awarded, in case it shall hereafter appear that the same was issued without just cause.

(a copy) teste, P. TINSLEY, *Clk.*

# APPENDIX, No. I.

TO THE

*NEW VIRGINIA JUSTICE, &c.*

CONTAINING

FORMS IN CONVEYANCING.

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NOTE....It may be necessary to apprise the several gentlemen into whose hands this book may fall, that it never was my intention, by publishing the following precedents, to supersede the use of counsel, in cases of importance or difficulty. These are calculated principally for such of our citizens as have it not in their power to obtain the aid of professional gentlemen. To those, I flatter myself it will be found a valuable collection. But in conveyances, where the title to the last purchaser is to be traced back through various intermediate purchasers, and in many other instances, it would be unsafe to trust to these precedents, which are adapted to the most simple transfers of property. For it must always be recollected, that to copy a precedent in a fair hand, does not necessarily constitute a conveyancer; but to be a proficient in that line, a knowledge of the laws which regulate real property is indispensably necessary.

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## AGREEMENTS.

THE various objects which may be comprehended under this title, make it impossible to insert every form applicable to it. I shall, however, observe the requisites to most agreements by our laws (which is copied from the statute of England, of 29 *Car. II.*) in the words of the law itself: "No action shall be brought whereby to charge any executor or administrator upon any special promise to answer any debt or damages out of his own estate; or whereby to charge the defendant upon any special promise to answer for the debt, default, or miscarriage

of another person ; or to charge any person upon any agreement made upon consideration of marriage ; or upon any contract for the sale of lands, tenements, or hereditaments, or the making any lease thereof for a longer term than one year ; or upon any agreement which is not to be performed within the space of one year from the making thereof, unless the promise or agreement upon which such action shall be brought, or some memorandum or note thereof shall be in writing, and signed by the party to be charged therewith, or some other person by him thereunto lawfully authorised." See *Virginia Laws, 1 Rev. Code*, ch. 10, p. 15.

*Articles of agreement for the purchase of a tract of land.*

Articles of agreement made and entered into, this                      day of  
in the year                      between A B, of &c. of the one part, and  
C D, of &c. of the other part, witnesseth, that the said A B, for and in  
consideration of the sum of                      to be paid by the said C D, pur-  
suant to the covenant and agreement of the said C D, herein after men-  
tioned, doth for himself and his heirs covenant and agree with the said  
C D, as follows, viz. that the said A B, or his heirs, shall and will, be-  
fore the                      day of                      next ensuing, make out a complete  
title in fee simple to, and (by such sufficient conveyances as the said  
C D, or his counsel, shall approve) convey and assure in possession to  
the said C D, and his heirs for ever, free from all manner of incum-  
brances, all that tract or parcel of land lying &c. (*here describe the land  
particularly.*)

And the said C D, in consideration of the covenant and agreement  
herein before contained, on the part of the said A B, doth hereby, for  
himself, his heirs, executors, and administrators, covenant and agree  
with the said A B, that he the said C D, his heirs, executors, or ad-  
ministrators, shall and will, upon making and executing such convey-  
ances and assurances as aforesaid, pay or cause to be paid to the said  
A B, his heirs, executors, or administrators, the sum of                      as and  
for, and in full consideration for the absolute purchase of the said tract  
or parcel of land.

In witness &c.

See MARRIAGE ARTICLES, MORTGAGES, &c.  
ARTICLES. See AGREEMENTS.

## ATTORNEY. [POWERS OR LETTERS OF]

### 1. *A power of attorney, to receive and recover the rents of an estate, and to give discharges.*

KNOW all men by these presents, that I, A B, of &c. have made, ordained, constituted, and appointed, and by these presents do make, ordain, constitute, and appoint A B, of &c. my true and lawful attorney, for me, and in my name, but to my use, to ask, demand, sue for, recover and receive, all and every such rents and arrears of rent as are now due and owing to me, by or from C D, as tenant or occupier of a certain (*here describe the property*) and for non-payment of the same rents, and arrears of rent, or any part thereof, to enter and distress, and the distresses so taken to cause to be disposed of according to law. And upon payment of the said rents, or arrears of rent, or any part thereof, for me and in my name to give acquittances and discharges for the same; and the monies so by him received immediately thereupon to pay over to me, or my representatives, or to my order; and further to do and execute all and every other lawful act and acts needful for recovering, receiving, and obtaining of the said rents, and arrears of rent now due, or to grow due for the premises, or any part thereof, but to my use as aforesaid, as fully and effectually, to all intents and purposes, as if I were personally present; hereby ratifying and confirming whatsoever my said attorney shall lawfully do, or cause to be done, in or about the premises.

In witness &c.

By observing the constituent parts<sup>4</sup> of the above form, it may be adapted to other purposes.

### 2. *Form of a power of attorney to transfer stock of the United States.*

Know all men by these presents, that                      do make, constitute, and appoint                      true and lawful attorney, for                      and in name to sell, assign, and transfer                      the                      stock, standing in                      name, in the books of                      with power also an attorney or attorneys under                      for that purpose to make and substitute, and to do all lawful acts requisite for effecting the premises; hereby ratifying and confirming all that                      said attorney, or                      substitute,



or substitutes shall do therein by virtue hereof. In witness whereof  
 have hereunto set hand and seal, the day  
 of in the year .

Sealed and delivered }  
 in presence of }

[Seal]

\_\_\_\_\_  
 \_\_\_\_\_ { Witnesses, with their names,  
 \_\_\_\_\_ { additions, and residence.

☞ See the mode of attestation at the end of the next form (3).

*The following directions respecting the attestations must not be omitted.*

The acknowledgment may be taken before any judge of the court of the United States, or of a superior court of law or equity in any state, or of a county court, or before the mayor or other chief magistrate of any place, or before a notary public.

If there be no public or official seal to the acknowledgment, proof of the execution of the power must be made by oath or affirmation of one of the witnesses, to be taken before some person duly authorised, at the place where the transfer is made.

### 3. *Form of a power of attorney to receive interest, executed before a magistrate.*

Know all men by these presents, that I \_\_\_\_\_ of the county of \_\_\_\_\_ do make, constitute and appoint my true and lawful attorney for me, and in my name, to receive the interest now due, to quarter ending the \_\_\_\_\_ day of \_\_\_\_\_ in the year \_\_\_\_\_ upon all the stock standing in my name in the books of \_\_\_\_\_ commissioner of loans for the state of \_\_\_\_\_ with power also an attorney or attorneys under him, for that purpose, to make and substitute, and to do all lawful acts requisite for effecting the premises; hereby ratifying and confirming all that my said attorney, or his substitute, shall do therein by virtue hereof. In witness whereof I have hereunto set my hand and seal, this \_\_\_\_\_ day of \_\_\_\_\_ in the year of our Lord \_\_\_\_\_.

Sealed and delivered in }  
 the presence of us }

[Seal]

\_\_\_\_\_  
 \_\_\_\_\_ { Witnesses, who must annex their addition, as  
 \_\_\_\_\_ { merchant, farmer, attorney, &c. and also their  
 \_\_\_\_\_ { place of residence.

*Be it known*, that on the \_\_\_\_\_ day of \_\_\_\_\_ in the year \_\_\_\_\_ before me came above named \_\_\_\_\_ and acknowledged the above letter of attorney to be his act and deed. In testimony whereof I have hereunto set my hand and seal, the day and year last aforesaid.

[Seal]

county, to wit.

I, \_\_\_\_\_ clerk of the county aforesaid, do hereby certify, that \_\_\_\_\_ esquire, whose hand and seal is affixed to the foregoing certificate of

acknowledgment, is a magistrate of the county of \_\_\_\_\_ and that due faith and credit ought to be paid to all his acts and deeds as such.

*In testimony whereof* I have hereunto set my hand,  
 [Official] and caused the seal of my office to be hereunto  
 [Seal.] affixed, this \_\_\_\_\_ day of \_\_\_\_\_ in the year \_\_\_\_\_ and  
 of our independence the \_\_\_\_\_.

*4. Form of a power of attorney to receive an invalid's pension.*

I, A B, of \_\_\_\_\_ county, state of \_\_\_\_\_ do hereby constitute and appoint C D, of \_\_\_\_\_ my lawful attorney, to receive in my behalf of \_\_\_\_\_ my pension for six months, as an invalid of the United States, from the \_\_\_\_\_ day of \_\_\_\_\_ one thousand &c. and ending the day of \_\_\_\_\_ of the same year. \_\_\_\_\_.

Signed and sealed in presence of

\_\_\_\_\_  
 \_\_\_\_\_ } Witnesses.

Acknowledged before me \_\_\_\_\_.

Besides the letter of attorney aforesaid, the attorney must produce the original certificate given to the pensioner by the state, and an affidavit made by him agreeable to the following form :

A B came before me, one of the justices of the county of \_\_\_\_\_ in the state of \_\_\_\_\_ and made oath, that he is the same A B to whom the original certificate in his possession was given, of which the following is a copy (*the certificate given by the state to be recited.*) That he served \_\_\_\_\_ (*regiment, corps, or vessel*) at the time he was disabled, and that he now resides in the \_\_\_\_\_ and county of \_\_\_\_\_ and has resided there for the last \_\_\_\_\_ years, previous to which he resided in \_\_\_\_\_.

*5. Form of a power of attorney, or order on the auditor, for the amount of a public claim.*

The auditor of public accounts will please issue a warrant on the treasurer, in favour of A A, for the amount of the above (or *within*) claim. Witness my hand, this \_\_\_\_\_ day of \_\_\_\_\_ in the year \_\_\_\_\_.

B C.

Witness, }  
 D W. }

county, to wit.

This day D W came before me, a justice of the peace for the county aforesaid, and made oath, that B C acknowledged the above (or *within*) to be his act and deed. Given under my hand, this \_\_\_\_\_ day of \_\_\_\_\_ &c. J P.

## AWARD.

### *An award upon an order of reference:*

WHEREAS, at a court held for &c. the                    day of                     
last, a cause in the said court depending, between A B, plaintiff, and  
C D, defendant, by consent of parties, was referred to E F, G H, and  
I K, or any two of them, to hear and determine all the said differ-  
ences. Now we, the said E F, G H, and I K, in pursuance of the said  
order or rule of reference, having heard both the said parties, their al-  
legations and answers, touching the matters in difference between  
them, and having thoroughly considered of the same, do award, or-  
der, and adjudge, of and upon the premises, in manner and form fol-  
lowing, viz: First, we do award, that the said C D shall pay or cause  
to be paid unto the said A B the sum of                    on the                    day  
of                    next, at the house of                    situate in                    commonly  
called                    between the hours of                    and                    of the same  
day: And we do also award and order, that the said A B shall, upon  
payment of the said sum of                    execute unto the said C D a general  
release of the matters to us referred, and that the said C D shall at the  
same time execute unto the said A B the like release. In witness &c.

☞ For other matters relating to awards, see that title in the bo-  
dy of the work.

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## BARGAIN AND SALE.

### *1. A deed of bargain and sale from husband and wife to the purchaser.*

THIS INDENTURE, made the                    day of                    in the  
year                    between A B, and C, his wife, of &c. of the one part,  
and D E, of &c. of the other part, witnesseth: That the said A B,  
and C, his wife, in consideration of                    of lawful money of this  
commonwealth, to them in hand paid by the said D E, at or before  
the ensembling and delivery of these presents (the receipt whereof is  
hereby acknowledged) HAVE bargained and sold, and by these pre-  
sents do, and each of them doth, bargain and sell unto the said D E,  
his heirs and assigns, a certain &c. (*here describe the land particularly*)

together with all [the singular houses, dove-houses, barns, buildings, stables, yards, gardens, orchards, lands, tenements, meadows, pastures, feedings, commons, woods, underwoods, ways, waters, water courses, fishings, privileges, profits, easements, commodities, advantages, emoluments, hereditaments, and appurtenances whatsoever, to the said belonging or appertaining, or with the same used or enjoyed, or accepted, reputed, taken, or known, as part, parcel, or member thereof, or as belonging to the same, or any part thereof] and the reversion and reversions, remainder and remainders, yearly and other rents, issues, and profits thereof, and of every part and parcel thereof: **TO HAVE AND TO HOLD** the said land, with the tenements, hereditaments, and all and singular other the premises herein before mentioned or intended to be bargained and sold, and every part and parcel thereof, with every of their rights, members, and appurtenances unto the said D E, his heirs and assigns, for ever [to and for the only proper use and behoof of him, the said D E, his heirs and assigns, for ever.] **AND** the said A B, and C, his wife, for themselves and their heirs, the said with all and singular the premises and appurtenances before mentioned, unto the said D E, his heirs and assigns, free from the claim or claims of them, the said A B, and C, his wife, or either of them, their or either of their heirs, and of all and every person or persons whatsoever, shall, will, and do warrant and for ever defend by these presents. In witness whereof, the said A B, and C, his wife, have hereunto set their hands and seals, the day and year first above written.

Signed, sealed, and delivered }  
in the presence of }

If the conveyance is made by an unmarried man, whatever relates to a wife in the foregoing precedent must be omitted. For the sake of brevity, the words included thus [ ] have of late been omitted, and instead thereof, after a description of the land, the words, *with all and singular the appurtenances, &c.* have been substituted. It must be admitted, that in conveyances in this country, where it is usual to describe the land by *metes and bounds*, and not merely by *name*, as in England, many of those words are unnecessary; as by a grant of the land itself, those things by operation of law pass with it. (*See Co. Lit.* 4, a.) But it must also be recollected, that the term *appurtenances*, in its legal signification, is much too limited to comprehend the various rights and privileges often intended to be granted. (*See Co. Lit.* 121, b.) For the mode of proceeding on examining a *feme covert*, or married woman, as prescribed by our laws. *See Virg. Laws*, ch. 90, sect. 6, p. 166, of the *Revised Code*.

## 2. Deed of bargain and sale, with various covenants.

[P] This form, which has been long settled by the best conveyancers in England, is, in my judgment, greatly to be preferred to the other, which is in general use in this country. Where there is simply a clause of warranty, it may be questionable whether the grantee can recover, unless there be an actual *eviction*. This point has been so decided in the supreme court of *Massachusetts*. (*See 1 Mass. Rep.* 464.)

What would be the determination of our own supreme court, it is impossible to say. Should it be the same as that of *Massachusetts*, what would be the situation of a purchaser, who had paid the whole of his purchase money, and who had never been *evicted*, but discovered a *deficiency* in the *quantity* of the land? Would an action of *assumpsit* lie, on account of a consideration which had failed, when the evidence of the contract was founded on a *deed*? These difficulties suggest the propriety of inserting such covenants in the deed as will embrace every possible case.]

THIS INDENTURE, made this                      day of                      in the year of our Lord                      BETWEEN A B, &c of the county of                      of the one part, and C D, of the same county (or, of the county of                      ) of the other part, WITNESSETH, That the said A B, &c. for and in consideration of the sum of                      of lawful money of Virginia, to him in hand paid by the said C D, at or before the sealing and delivery of these presents (the receipt whereof the said A B, &c. doth hereby acknowledge, and thereof, and of every part and parcel thereof, doth clearly exonerate, acquit, and discharge, the said C D, his heirs, executors, administrators, and assigns, and every of them for ever, by these presents) HE, the said A B, &c. HATH granted, bargained, sold, aliened, enfeoffed, and confirmed, and by these presents DOTH grant, bargain, sell, alien, enfeoff, and confirm, unto the said C D, his heirs and assigns, for ever, *all that* certain tract or parcel of land, with the appurtenances, situate, lying, and being in the county of                      containing                      acres (be the same more or less, *if such was the contract*) and bounded as follows, to wit, BEGINNING at &c. (*here describe the land particularly, by metes and bounds*) and the reversion and reversions. remainder and remainders, of all and singular the said tract or parcel of land, and premises, hereby granted, or mentioned to be hereby granted, and of every part and parcel thereof; and *all the rents, issues, services, and profits, to the same, or any part or parcel thereof, incident, belonging, or appertaining; and also all and every the estate and estates, rights, titles, claims, interests, and demands whatsoever, of him, the said A B, &c. in, to, or out of the said tract of land, and every part and parcel thereof: To have and to hold* the said tract or parcel of land, and all other the premises hereby granted, bargained, and sold, or mentioned or intended to be hereby granted, bargained, and sold, and every part and parcel thereof, with their and every of their appurtenances, unto the said C D, his heirs and assigns, for ever, *to the only and proper use and behoof of him, the said C D, his heirs and assigns, for ever: And the said A B, &c. doth hereby grant, for him and his heirs, that he, the said A B, and his heirs, the said tract or parcel of land, and premises, hereby granted, or mentioned to be granted, and every part or parcel thereof, with all and singular their and every of their rights, members and appurtenances, unto the said C D, his heirs and assigns, against him, the said A B, &c. and his heirs, and against all and every other person and persons whatsoever, shall and will warrant, and for ever defend, by these presents. And the said A B, &c. for himself, his heirs, executors, and administrators, and for every of them, doth covenant and grant to and with the said C D, his heirs and assigns, and to and with every of them, by*

these presents, in manner and form following (*that is to say*) that the said A B, &c. now is true and lawful owner of the said tract of land, and other the premises hereby granted, or mentioned to be hereby granted, and of every part and parcel thereof, with their and every of their appurtenances, and is rightfully and absolutely seised thereof, and of every part and parcel thereof, of a good, pure, absolute, and indefeasible estate of inheritance, in fee simple, without any manner of condition, trust, contingent, covenant, proviso, or limitation of use or uses, or other restraint, matter, or thing whatsoever, to alter, change, charge, determine, incumber, defeat, or evict the same: *And also*, that he, the said A B, &c. now hath good right, lawful and absolute power and authority in himself, to grant, alien, and convey, all and singular the said tract of land and premises hereby granted, or mentioned to be hereby granted, as aforesaid, and every part and parcel thereof, with the appurtenances, unto the said C D, his heirs and assigns, to the only use of him, the said C D, his heirs and assigns, in manner and form aforesaid: *And also*, that the said C D, his heirs and assigns, and every of them, shall or lawfully may, from time to time, and at all and every time and times hereafter, have, hold, occupy, use, possess, and enjoy, all and singular the said tract of land, and premises hereby granted, or mentioned to be hereby granted, and every part and parcel thereof, with all and singular their and every of their appurtenances, and all and every the rents, issues, and profits and commodities thereof, arising, accruing, and growing, to have, receive, and take, without any manner of let, suit, trouble, vexation, eviction, disturbance, or other hindrance or molestation whatsoever, of or by the said A B, &c. his heirs or assigns, or any other person or persons whatsoever, lawfully claiming or to claim the said tract of land and premises, or any part or parcel thereof: *And also*, that the said land, tenements, hereditaments, and premises, hereby granted, or mentioned or intended to be hereby granted, as aforesaid, and every part and parcel thereof, with all and singular their and every of their appurtenances, now are and be, and from henceforth for ever hereafter shall continue, remain, and be, unto the said C D, his heirs and assigns, free and clear, and freely and clearly, and absolutely freed and acquitted, exonerated, and discharged, of and from all and all manner of former and other bargains, sales, gifts, grants, feoffments, devises, uses, jointures, dowers, estates, leases, rights, titles, rents, arrears of rents, issues, fines, amercements, debts, duties, judgments, executions, and all debts of record, extents, seizures, charges, titles, troubles, forfeitures, annuities, and incumbrances, whatsoever, had, made, committed, done, acknowledged, or suffered, or caused to be had, made, committed, done, acknowledged, by the said A B, &c. or by any other person or persons whatsoever. [*For the clause for further assurance, see RELEASES, No. 2, at the end.*] And the said A B, &c. for himself, his heirs, executors, and administrators, and for every of them, doth covenant and grant to and with the said C D, his heirs and assigns, and to and with every of them, by these presents, that he, the said A B, &c. hath not done, committed, executed, or suffered, any act or acts, thing or things, whatsoever, whereby the said tract of land and premises, or any part thereof, now or at any time hereafter shall or may be impeached or incumbered in title, charge, estate, or otherwise. *In witness whereof,*

the said A B. &c. hath hereunto set his hand, and affixed his seal, the day and year first above written.

*Signed, sealed, and delivered,* }  
*in presence of* }

If the deed be made by husband and wife, it must be so expressed; and the other parts of the deed, relating to the grantors, must consequently be in the plural.

## BILLS OF EXCHANGE.

THE following examples of an *inland* and *foreign* bill of exchange, drawn in conformity to the precautions recommended by *Beaumes (Lex Mercatoria*, p. 451) it is presumed will suffice.

### *An inland bill of exchange.*

*Richmond, May 24th, 1810.*

Exchange for 10,000 dollars.

At sight (or, at *days sight*, or, *days after date*) pay to Mr. A B, or order, *ten thousand dollars*, value received of him, and place the same to account, as per advice (or, *without further advice*) from C D.

To Mr. E F, merchant, in *Alexandria*.

### *A foreign bill.*

*Richmond, May 24th, 1810.*

Exchange for 10,000 *l.* sterling.

At *days after date* (or, at *days after sight*) of this my first bill of exchange (second and third of the same tenor and date not paid) pay to Messrs. A B & Co. or order, *ten thousand pounds sterling*, value received of them, and place the same to account, as per advice. C D.

To Mr. E F, merchant, *London*.

If current money is paid for a foreign bill, then after the word '*sterling*' add '*for Virginia currency, value here received.*'

By the laws of *Virginia*, "In all bills of exchange due in current money of this commonwealth, or for current money advanced and paid for such bills, the sum in current money that was paid, or allowed for the same, shall be mentioned and expressed in such bill; and in default thereof, in case such bill shall be protested, and a suit brought for the recovery of the money due thereby, the sum of money expressed in such bill shall be held and taken as current money, and judgment

shall be entered accordingly." See *Virginia Laws*, 1 *Rev. Code*, ch. 77, sect. 4, p. 114.

By *Virginia Laws*, ch. 29, p. 86, sect. 1, of 1 *Rev. Code*, "If a bill of exchange, for the sum of five pounds, or upwards, dated at any place in *Virginia*, drawn upon a person at any other place therein, expressed to be for value received, and payable at a certain number of days, weeks, or months, after date, being presented to the person upon whom it shall be drawn, shall not be accepted, by subscribing his name, with his proper hand, to the acceptance, written at the foot, or on the back of the bill, or being accepted in that manner, and not otherwise, shall not be paid before the expiration of three days after it shall become due, the person to whom it shall be payable, or his agent, or assigns, may cause the bill to be protested by a notary public, or, if there be no such, by any other person, in presence of two or more credible witnesses, for non-acceptance, in the form or to the effect following, written under a fair copy of the bill.

Know all men, that I, \_\_\_\_\_ on the \_\_\_\_\_ day of \_\_\_\_\_ at the usual place of abode of the above-named \_\_\_\_\_ presented to him the bill, of which the above is a copy, and which the said \_\_\_\_\_ did not accept, wherefore I, the said \_\_\_\_\_ do hereby protest the said bill. Dated at \_\_\_\_\_ this \_\_\_\_\_ day of \_\_\_\_\_ ;

Or for non-payment, after acceptance, in the same form, or to the same effect, except that the words "presented to him the bill, of which the above is a copy, and which the said \_\_\_\_\_ did not accept," shall be left out, and instead of them the words, "demanded payment of the bill, of which the above is a copy, and which the said \_\_\_\_\_ did not pay," be inserted: And the drawer, such protest being sent to him, or notice thereof in writing being given to him, or left at the place of his usual abode, within fourteen days thereafter, shall pay the money mentioned in the bill to the person entitled to receive it, with interest, at the rate of five *per centum* by the year, from the day of the protest; and he to whom the bill shall be payable, neglecting to procure the protest to be made, or due notice thereof to be given, shall be liable for all costs and damages accruing thereby."

Sect. 2. "If the bill shall be lost, or shall miscarry, the drawer shall sign and deliver another of the same tenor, sufficient security being given to indemnify him against all persons who may claim under the former."

## BILLS OF SALE.

### 1. *Bill of sale of a slave.*


Know all men by these presents, that I, A B, of \_\_\_\_\_ for and in consideration of the sum of \_\_\_\_\_ to me in hand paid by C D, of \_\_\_\_\_ at and before the sealing and delivery of these presents (the receipt whereof I do hereby acknowledge) have bargained, sold, grant-



ed, and confirmed, and by these presents do bargain, sell, grant, and confirm, to the said C D a certain *female* negro slave, named : To have and to hold the said *female* negro slave, and *her future increase*, to the only proper use and behoof of the said C D, his executors, administrators, and assigns, for ever. And I, the said A B, for myself, my executors, and administrators, the said *female* negro slave, *with her future increase*, to the said C D, his executors, administrators, and assigns, against me, the said A B, my executors, administrators, and assigns, and against all and every other person and persons whatsoever, shall and will warrant, and for ever defend, by these presents. In witness whereof, I have hereunto set my hand, and affixed my seal, this                      day of                      in the year                      .

*Sealed and delivered, and possession delivered,  
in presence of*

**☞ If the bill of sale be for a male negro slave, it must be so expressed; and whatever relates to the *future increase* must be omitted.**

 The above form may easily be altered to suit a conveyance of other personal property.

**2. Bill of sale, in nature of a mortgage.**

*(The above form may be pursued to the end of the clause of warranty, at these words, "and for ever defend by these presents," then say)* Provided always, and it is hereby agreed between the said parties to these presents, that if I, the said A B, my executors, administrators, or assigns, or any of us, do and shall well and truly pay, or cause to be paid, unto the said C D, or his certain attorney, executors, administrators, or assigns, the full sum of \_\_\_\_\_ on or before the day of \_\_\_\_\_ in the year \_\_\_\_\_ for the redemption of the hereby bargained premises, then these presents, and every clause, article, condition, and thing, herein contained, shall cease and be void, otherwise to remain in full force and effect. In witness &c.

## BOND.

KNOW all men by these presents, that I, A B, of &c. am held and firmly bound unto C D, of &c. in the sum of \_\_\_\_\_ of lawful money of this commonwealth, to be paid to the said C D, or his certain attorney, executors, administrators, or assigns; for the true payment whereof, I bind myself, my heirs, executors, and administrators, firmly by these presents, sealed with my seal. Dated the \_\_\_\_\_ day of \_\_\_\_\_ in the year \_\_\_\_\_

The condition of the above obligation is such, that if the above-bounden A B, his heirs, executors, or administrators, do and shall well and truly pay, or cause to be paid, unto the above-named C D,

his executors, administrators, or assigns, the full sum of                    on  
the                    day of                    next ensuing the date of the above written  
obligation, then the above obligation to be void, or else shall remain  
in full force.

Signed, sealed, and delivered, }  
in presence of                    }

Where the condition of the bond is for the payment of money, the  
sum expressed in the condition is usually half that of the penalty.

Bonds are also frequently entered into, conditioned for the perform-  
ance of covenants, &c.

## COVENANTS.

It will not be necessary to insert any precedents under this head, as  
no set form of words are necessary to be made use of in creating a co-  
venant.

Any form of expression amounting to an agreement, if under seal,  
is sufficient. *Doug. 737.*

## GIFT. [DEED OF]

### *A deed of gift of personal estate.*

KNOW all men by these presents, that I, A B, of &c. for and in  
consideration of the natural love and affection which I bear to C D, of  
&c. as well as for the further consideration of one dollar to me in hand  
paid, by the said C D, at or before the ensealing and delivery of these  
presents (the receipt whereof is hereby acknowledged) have given and  
granted, and by these presents do give and grant unto the said C D,  
his executors, administrators, and assigns (*here describe the property  
particularly*) to have and to hold the said                    unto him the said C D,  
his executors, administrators, and assigns, forever. And the said A B,  
for himself, his executors, and administrators, the said                    unto  
the said C D, his executors, administrators, and assigns, against the  
claim of him the said A B, his executors, and administrators, and  
against the claim or claims of all and every person or persons whatso-  
ever, shall and will warrant, and forever defend them by these pre-  
sents.

In witness &c.

## LEASES.

*A lease of house and lands for a term of years.*

*THIS indenture, made this       day of       in the year       &c. between A B, of &c. of the one part, and C D, of &c. of the other part, witnesseth, That for and in consideration of the rents, covenants and agreements, herein after reserved and contained, and which by and on the part of the said C D, his executors, administrators, and assigns, are to be paid, done, and performed, he the said A B hath leased, demised, granted, and to farm let, and by these presents doth lease, demise, grant, and to farm let, unto the said C D, his executors, administrators, and assigns, all that &c. (here describe the property) with the appurtenances, now in the tenure of &c. (if there are any exceptions of parts of the demised premises, as of trees, pigeon-houses, &c. they should be here mentioned, with a reservation of free liberty of ingress, egress, and regress, &c.)*

*To have and to hold the said       (except as before excepted) unto the said C D, his executors, administrators, and assigns, from the day of       next ensuing the date hereof, for and during, and unto the full end and term of       years, from thence next ensuing, and fully to be complete and ended: yielding and paying therefor, yearly and every year, during the said term, unto the said A B, the yearly rent or sum of       on the       day of       in each year, by even and equal portions; the first payment thereof to commence on the day of       next ensuing (if there are any additional rents, here insert them). [Provided always, and upon condition nevertheless, that if it shall happen that the said yearly rents hereby reserved, or either of them, or any part of them, or other the occasional payments (if any there are) shall be behind and unpaid by the space of       days next over or after either of the days of payment, whereon the same ought to be paid as aforesaid, being lawfully demanded; or if no sufficient distress can be found on the premises hereby demised, whereof to make the said rent, at the time when the same shall be payable; or if the said C D, his executors, or administrators, or any of them shall assign over, or otherwise part with this indenture, or the premises hereby leased, or any part thereof, without the consent of the said A B, his heirs or assigns, first had and obtained in writing, under his or their hands and seals for that purpose, then, and in either of the said cases, it shall and may be lawful to and for the said A B, his heirs, or assigns, into the premises hereby leased, or any part thereof, in the name of the whole, to re-enter, and the same to have again, repossess and enjoy, as in his and their first and former estate, any thing herein to the contrary contained notwithstanding.] And the said C D, doth hereby, for himself, his heirs, executors, &c. covenant and agree to*

and with the said A B, his heirs, and assigns, that he the said C D, his heirs, executors, &c. shall and will well and truly pay, or cause to be paid unto the said A B, his heirs or assigns, the said yearly rent of (and other additional rents) at the days, times, and place, and in such manner as are herein before appointed for payment thereof, according to the respective reservations thereof afore-mentioned, and the true intent and meaning of these presents. And that the said C D, his executors, administrators, and assigns, shall, and will, at their own proper costs and charges, well and sufficiently repair, amend, preserve, and keep in repair the said tenement, with all houses, fences, &c. thereto belonging during this present lease (accidents by fire, or the act of God excepted). And also, that it shall be lawful for the said A B, his heirs and assigns, with workmen and others, in his company, or without, at any time in the day-time, to enter peaceably on the demised premises, during the said term, to view the state of the reparations thereof; and of all such decays, and want of reparations then and there found, to give notice to the said C D in writing, or to leave the same on the demised premises, at the most conspicuous place thereon, to repair the same within the space of then next ensuing; within which time the said C D, for himself, his executors, administrators and assigns, doth covenant and agree to repair and amend the same accordingly (except as before excepted) [*here may follow other covenants, as that the landlord shall furnish timber, &c.; that the tenant shall plant and preserve fruit-trees; shall cultivate the land in such a particular manner; that the straw, &c. made upon the land shall be fed upon it, and the manure carried out and ploughed in; that the tenant shall preserve the pigeons in the dove houses; not to cut wood but of a particular kind, &c.*] And lastly, that it shall and may be lawful for the said C D, his executors, administrators, and assigns (paying the rents herein before reserved, and performing the covenants and agreements herein before mentioned or contained, and which on his and their parts and behalfs are or ought to be paid, done, and performed) peaceably and quietly to have, hold, occupy, possess, and enjoy, the said premises hereby leased, with the appurtenances, during the said term of years hereby granted, without any molestation or interruption whatsoever, of or by him the said A B, his heirs or assigns, or of or by any person or persons, lawfully or equitably claiming or to claim, from, by, or under him, them, or any of them.

In witness, &c.

**NOTE....**Leases for lives may be drawn after the above form, except in the *habendum*, the grant is to the lessee or tenant, *his heirs and assigns*, from the day of the date hereof, for and during the natural lives of such persons as may be agreed on between the parties.

**NOTE ALSO....**The words included thus [ ] in the foregoing precedent, are not always inserted.

For a conveyance by lease and release, see **RELEASES**.

## MARRIAGE ARTICLES.

*An agreement before marriage, that the intended husband and wife shall each enjoy their own separate estates. An assignment of hers (being personal estate) to the uses in the deed expressed.*

THIS indenture tripartite, made the                      day of                      in the year                      between A A, of                      of the first part, B B, widow, and relict of C B, late of                      deceased, of the second part. and D D. of                      and E E, of                      of the third part. Whereas a marriage is shortly intended to be had and solemnized, by the permission of God, by and between the said A A, and the said B B; and whereas the said B B is possessed of a considerable personal estate, consisting of (*here particularise the property*) and whereas it hath been agreed, that the said A A should, after the said intended marriage had, receive and enjoy, during the joint lives of them the said A A and B B, the interest and occupation of the said personal estate, and also that the same, and the interest and profits thereof, from and after the decease of such of them the said A A and B B as should first happen to die, should be at the sole and only disposal of the said B B, notwithstanding her coverture; and whereas it hath been also agreed, that in case the said B B should, after the said intended marriage had, happen to survive the said A A. that she should not have or claim any part of the real or personal estate whereof the said A A should be seized or possessed, or entitled unto at any time during the coverture between them, by virtue of her dower, or title of dower at common law, or by virtue of her being administratrix, or entitled to administration of the goods and chattels, rights and credits of the said A A, or otherwise however. Now this indenture witnesseth, that in pursuance of the before recited agreement, and in consideration of the sum of ten shillings. of lawful money of this commonwealth, to the said B B in hand paid by the said D D and E E, at and before the ensembling and delivery of these presents, the receipt whereof is hereby acknowledged, she the said B B, by and with the privy, consent and agreement of the said A A, testified by his being made a party to, and his sealing and delivery of these presents, hath granted, bargained, sold, assigned, transferred and set over, and by these presents doth grant, bargain, sell, assign, transfer and set over unto the said D D and E E. their executors, administrators, and assigns, all the said (*here mention the property again*) To have and to hold the said property hereby conveyed unto the said D D and

E E, their executors, administrators and assigns; upon such trusts, nevertheless, and to and for such intents and purposes, and under such provisos and agreements, as are herein after mentioned; that is to say, in trust for the said B B, and her assigns, until the solemnization of the said intended marriage; and from and after the solemnization of the said intended marriage, then upon trust, that they the said D D and E E, their executors, administrators and assigns, shall and do permit the said A A, during the joint lives of the said A A and B his intended wife, to have, receive, take, and enjoy, all the interest and profits of the said property hereby assigned, to and for his own use and benefit, and from and after the decease of such of them, the said A A and B B, as shall first happen to die, then upon trust, that they the said D D and E E, their executors, administrators and assigns, shall, and do assign, transfer, and pay over all the said property to the said B, in case she survive the said A A, but if she die before him, then unto such person and persons, and at the time and times, and in such parts and proportions, manner and form, as she the said B B shall, from time to time, notwithstanding her coverture, by any writing or writings under her hand and seal, attested by three or more credible witnesses, or by her last will and testament in writing, to be by her signed, sealed, published and declared, in the presence of the like number of witnesses, direct, limit, or appoint, to the intent that the same may not be at the disposal of, or subject to the controul, debts, forfeitures or engagements of the said A A, her intended husband; and in default of such direction, limitation, or appointment, then to &c. (*whatever persons the parties agree upon*)

*Provided always*, and it is hereby declared and agreed by and between all the said parties to these presents, that in case the said B B (surviving the said A A, her intended husband) shall at any time hereafter claim and recover any part or parcel of the real or personal estate, whereof the said A A, or any other person or persons in trust for him, shall be seized or possessed, or entitled unto, at any time during the coverture between them, by virtue of her dower, or title of dower at common law, or by virtue of her being administratrix, or entitled to administration of the goods, chattels, rights and credits, of the said A A, as aforesaid, then, and in that case, they the said D D and E E, their executors, administrators and assigns, shall, from time to time, and at all times from thenceforth, stand and be possessed of the said property hereby conveyed, in trust for the only benefit of the said A A, his executors, administrators and assigns, any thing in these presents contained to the contrary thereof in any wise notwithstanding.

In witness, &c.

# MORTGAGES.

## 1. *A mortgage of land in fee.\**

[This may pursue the form of a deed of bargain and sale, to the end of the *habendum*, or that part of the deed which ascertains the quality of the estate granted, by the words *to have and to hold*, &c. then proceed] *Provided always*, and upon condition, that if the said A B. his heirs, executors, or administrators, shall well and truly pay, or cause to be paid, unto the said C D, his heirs, executors, administrators or assigns, the full and just sum of                    on the                    day of                    next ensuing the date of these presents, at                    in the county of                    then and in such case, and at all times from thenceforth, these presents, and all the estate hereby granted, and every clause and sentence herein contained, shall cease, determine, and be utterly void, to all intents and purposes, any thing herein contained to the contrary notwithstanding. (*Here may follow such covenants as those contained in the next precedent, with such variations only as the difference of the two estates granted make necessary.*)

In witness &c.

## 2. *A mortgage by a demise of house, &c. for a term of years.*

*This indenture*, made the                    day of                    in the year                    between A A, of &c. of the one part, and B B, of &c. of the other part, witnesseth, That for and in consideration of the sum of                    of lawful money of this commonwealth, to the said A A in hand paid, by the said B B, at or before the enrolling and delivery of these presents, the receipt whereof he the said A A doth hereby acknowledge, He the said A A hath granted, bargained, sold, and demised, and by these presents doth grant, bargain, sell, and demise, unto the said B B, his executors, administrators, and assigns, all those several messuages, tenements, &c. (*here particularise the house, &c.*) with all and singular their appurtenances, and the reversion and reversions, remainder and remainders, rents, issues, and profits thereof, and of every part and parcel thereof. To have and to hold the said messuages, tenements, &c. buildings, ground, hereditaments, and all and singular other the premises, with their and every of their appurtenances, unto the

\* See on the doctrine of mortgages generally, an excellent treatise published by John Joseph Powell, Esq. See also a very valuable note (1) to Mr. Hargrave's edition of Coke on Littleton, p. 103. a : in which Mr. Hargrave gives the preference to a mortgage for a term of years to a mortgage in fee, with his reasons for such preference.

said B B, his executors, administrators and assigns, from the day next before the day of the date hereof, for and during the full time and term, and unto the full end and term of *one thousand years*, from thence next ensuing, and fully to be complete and ended; yielding and paying therefor, the rent of a pepper-corn, on the                      day of                      in every year, if the same be lawfully demanded. *Provided always*, and upon condition, that if the said A A, his heirs, executors, or administrators, shall and do well and truly pay, or cause to be paid, unto the said B B, his executors, administrators, or assigns, at                      in the county of                      the full and just sum of                      of lawful money of this commonwealth, upon the                      day of                      next ensuing the date hereof, then, and in such case, these presents, and the term and estate hereby granted, and every clause and sentence herein contained, shall cease, determine, and be utterly void, to all intents and purposes, any thing herein contained to the contrary notwithstanding. And the said A A doth hereby, for himself, his heirs, executors, and administrators, covenant and agree with the said B B, his executors, administrators, and assigns, that the said A A, his heirs, executors, or administrators, shall and will well and truly pay, or cause to be paid, unto the said B B, his executors, administrators, or assigns, the said sum of                      at such time and place as are herein before mentioned. And further, that it shall and may be lawful to and for the said B B, his executors, administrators, and assigns, from time to time, and at all times from and after default shall happen to be made in the payment of the said sum of                      or any part thereof, contrary to the form and effect of the aforesaid proviso and covenant of the same, peaceably and quietly to enter into, have, hold, occupy, possess, and enjoy the said messuages or dwelling houses, buildings, hereditaments, and premises, and to receive and take the rents and profits thereof, for and during all the residue which shall be then to come and unexpired of the said term of one thousand years, without the lawful let, suit, trouble, denial, eviction, or interruption of or by the said A A, his heirs or assigns, or of or by any other person or persons whomsoever. And it is hereby declared and agreed by and between the said parties to these presents, that in the mean time, and until default shall happen to be made of or in payment of the said sum of                      contrary to the form and effect of the aforesaid proviso, and covenant for payment of the same, it shall and may be lawful to and for the said A A, and his heirs, peaceably and quietly to have, hold, and enjoy, all and singular the said messuages or dwelling houses, buildings, hereditaments, and premises, and to receive and take the rents and profits thereof, and of every part thereof, to and for his and their own use and benefit, without the lawful let, suit, trouble, or interruption of the said B B, his executors, administrators, or assigns, or of any other person or persons, lawfully claiming or to claim, from, by or under him or them, or any of them.

In witness, &c.



## PENAL BILL.

NO particular form seems to be appropriated to those instruments. Any engagement to pay money under a penalty will amount to a penal bill, as in the following example.

I promise to pay to C D, or order, one hundred dollars, on or before the       day of       next ensuing, for the true payment whereof I bind myself, my heirs, executors, and administrators, firmly by these presents, in the penal sum of two hundred dollars. Witness my hand and seal, this       day of       in the year

Teste.

A penal bill is an engagement, under *hand and seal*, to pay a sum of money, but without a penalty. A promissory note is an engagement to pay under *hand only*, without either seal or penalty.

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## RELEASES,

### A CONVEYANCE BY LEASE AND RELEASE.

#### 1. *Lease or bargain and sale for a year.*

*THIS indenture*, made this       day of       in the year &c. between A B and C his wife, of       of the one part, and D E, of       of the other part, witnesseth, That the said A B and C his wife, in consideration of one dollar to them in hand paid by D E, at or before the ensealing and delivery of these presents (the receipt whereof is hereby acknowledged) and for other good causes and considerations them, the said A B and C his wife, thereto specially moving, *have bargained and sold*, and by these presents do, and each of them doth, bargain and sell unto the said D E, his executors, administrators and assigns, *all that &c. (here describe the land as in Bargain and Sale, which see).* *To have and to hold* the said tract or parcel of land, tenements, hereditaments, and all and singular other the premises herein before mentioned or intended to be bargained and sold, and every part and parcel thereof, with their and every of their rights, members, and appurtenances, unto the said D E, his executors, administrators, and assigns, from the day next before the date of these presents, for and during and unto the full end and term of one whole year from thence next ensuing, and fully to be completed and ended.

*Yielding* and paying therefor, unto the said A B and C his wife, and their heirs and assigns, the yearly rent of one pepper-corn, at the expiration of the said term; if the same shall be lawfully demanded: *To the intent* and purpose, that by virtue of these presents, and of the statute for transferring uses into possession, the said D E may be in actual possession of the premises, and be thereby enabled to take and accept a grant and release of the freehold, reversion, and inheritance of the same premises, and of every part and parcel thereof, to them, their heirs and assigns, for ever, as declared by another indenture, intended to bear date the next day after the day of the date hereof. In witness whereof the parties to these presents their hands and seals have subscribed and set, the day and year first above written.

Scaled and delivered,  
in presence of  
A B, &c. }

A B [L. s.]  
C B [L. s.]  
D E [L. s.]

## 2. The deed of release.

(Which must always bear date the day after the former lease.)

*This indenture*, made the            day of            in the year  
&c. between A B and C his wife, of            of the one part, and D E,  
of the other part, witnesseth, That in consideration of the sum of  
of lawful money of this commonwealth, to the said A B and  
C his wife in hand paid by the said D E, at or before the ensembling  
and delivery of these presents (the receipt whereof is hereby acknow-  
ledged. They, the said A B and C his wife, have, and each of them  
hath, granted, bargained and sold, released and confirmed, and by these  
presents do, and each of them doth, grant, bargain and sell, release  
and confirm, unto the said D E, his heirs and assigns, all that &c.  
(*here describe the land particularly, as in the lease next above, and as in  
Bargain and Sale, which see.*) [All which said premises are now in the  
actual possession of the said D E, by virtue of a bargain and sale to  
him thereof made by the said A B and C his wife, for one whole year,  
in consideration of one dollar to them in hand paid, by the said inden-  
ture, bearing date the day next before the day of the date hereof, and  
by force of the statute for transferring uses into possession] and the  
reversion, &c. (*as in the deed of Bargain and Sale.*) *To have and to hold*  
the said tract or parcel of land, with the said tenements, hereditaments,  
and all and singular other the premises herein before mentioned to be  
hereby granted and released, with their and every of their appurte-  
nances, unto the said D E, his heirs and assigns, for ever, to and for  
the only proper use and behoof of him the said D E, his heirs and  
assigns, for ever, and to and for no other use, intent or purpose what-  
soever.

*And* the said A B and C his wife, for themselves, their heirs and  
assigns, the said tract or parcel of land, with all and singular the pre-  
mises and appurtenances thereto belonging, unto the said D E, his  
heirs and assigns, against the claim of them, the said A B and C his  
wife, their heirs and assigns, and against the claim or claims of all  
and every person or persons whatsoever, shall, will, and do warrant  
and for ever defend by these presents. [And the said A B and C his

wife, for themselves, their heirs, executors, and administrators, do, and each of them doth, covenant, promise and grant, to and with the said D E, his heirs and assigns, in manner and form following, that is to say; that notwithstanding any act, matter, or thing whatsoever, by the said A B and C his wife, or either of them, or any ancestor, through or from whom they or either of them claim, or by any person or persons claiming or to claim from, by or under them, or any of them, done, committed, or wittingly or willingly suffered to the contrary, they, the said A B and C his wife, now are and stand lawfully, rightfully, and absolutely, seized in their demesne as of fee, of and in the said tract or parcel of land, of a good, sure, lawful, absolute, and indefeasible estate of inheritance, in fee simple to them, and their heirs, without any reversion, remainder, trust, limitation, power of revocation, use or uses, or any other matter, restraint or thing whatsoever, to alter, change, charge, revoke, make void, lessen, incumber, or determine the same: And that notwithstanding any such act, matter or thing, as aforesaid, they, the said A B and C his wife, now, and at the time of ensealing and delivery of these presents, have in themselves good right, full power and absolute authority, to grant and convey the said tract or parcel of land, with its appurtenances, unto the said D E, his heirs and assigns, for ever, in manner aforesaid. And also, that it shall and may be lawful to and for the said D E, his heirs and assigns from time to time, and at all times hereafter, peaceably and quietly to enter into, have, hold, occupy, possess and enjoy, the said tract or parcel of land, and to take the rents, issues and profits thereof, from and after the day of the date of these presents, to and for his own use and benefit, without the lawful let, suit, trouble, denial, eviction, or interruption, of or by the said A B and C his wife, their heirs or assigns, or of or by any other person or persons whatsoever, lawfully claiming or to claim estate, right, title, trust, or interest of, in, to or out of the said tract or parcel of land, or any part thereof, from, by or under, or in trust for him, them, or any of them, or of any of the ancestors of the said A B and C his wife, from or under whom they claim; and that free and clear, and freely and clearly acquitted, exonerated and discharged, or otherwise by the said A B and C his wife, their heirs, executors, or administrators, well and sufficiently saved, defended, kept harmless, and indemnified, of, from and against all manner of former and other gifts, grants, bargains, sales, leases, mortgages, jointures, dowers, titles of dowers, uses, trusts, wills, recognizances, judgments, extents, executions, annuities, rents, arrears of rent, and of and from and against all and singular other estates, titles, troubles, charges and incumbrances whatsoever, had, made, done, committed, occasioned or suffered, by the said A B and C his wife, or by any other person or persons, lawfully claiming, from, by or under, or in trust from them, or either of them, or their or either of their act, means, assent, consent, privity or procurement. And moreover, that the said A B and C his wife, and their heirs, shall and will, from time to time, and at all times hereafter, during the space of                    next ensuing the date hereof, upon every reasonable request, and at the proper costs and charges of the said D E, his heirs and assigns, make, do and execute, or cause to be made, done and executed, all and every such other lawful and reason-

ble acts, conveyances and assurances in the law, for the further, better, more perfect, and absolute granting, conveying, and assuring of the said tract or parcel of land, with its appurtenances, unto the said D E, his heirs and assigns, for ever, as by the said D E, his heirs or assigns, or by his or their counsel learned in the law, shall be reasonably advised, or devised, or required: So as such further assurances contain in them no further or other warranty, or covenants, than against the person or persons, his or their heirs, who shall make or do the same, and so as the party, who shall be requested to make such further assurances, be not compelled or compellable, for making or doing thereof, to travel above \_\_\_\_\_ miles from his or their respective dwellings or places of abode.] In witness &c.

NOTE. That part of the foregoing precedent included thus [ ] has become the modern practice in England, instead of the clause of *warranty*. It is, however, seldom used in this country. See 2 *Black. Com.* 304.

The above form may be applied to a conveyance by *release alone*. When it is thus used, the second part only must be attended to, and the recitals must bring the case within the description of some one of those, to which such a conveyance is proper; and must also omit whatever relates to the deed of bargain and sale for a year. See *those cases in which a release is the proper conveyance*, in *Black. Com.* 2 vol. p. 324, and *Co. Litt.* under "*Releases*."

## TRUST. DEED OF

### *Deed of trust to secure the payment of debts.*

*THIS indenture*, made this \_\_\_\_\_ day of \_\_\_\_\_ in the year of our Lord \_\_\_\_\_ between A D (*the debtor*) of the first part, B T, and C T, &c (*the trustees*) of the second part, and E C (*the creditor*) of the third part: *Whereas* the said A D is justly indebted to the said E C in the sum of \_\_\_\_\_ to be paid on the \_\_\_\_\_ day of \_\_\_\_\_ in the year \_\_\_\_\_ (*or, if different payments, mention them*) as by a bond (*or bonds, or other security*) bearing date on the \_\_\_\_\_ day of \_\_\_\_\_ in the year \_\_\_\_\_ more fully appears; which debt (*with the legal interest thereon accruing, if interest is to be paid*) the said A D is willing and desirous to secure: *Now this indenture witnesseth*, that for and in consideration of the premises, and also for the further consideration of one dollar, of lawful money of Virginia, to the said A D (*the debtor*) in hand paid by the said B T and C T, &c. (*the trustees*) at and before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged, he, the said A D, hath given, granted, bargained, sold, aliened, enfeoffed, released, and confirmed, and by these presents doth give, grant, bargain, sell, alien, enfeoff, release, and confirm, to the said B T and C T, &c. their heirs and assigns, for ever, all that

tract or parcel of land, lying and being in the county of        in the state of        containing        acres, be the same more or less, and bounded as follows, to wit, *Beginning at &c. (here describe the land particularly)* also the following slaves, and other personal property, to wit, *(here specify the slaves by name, &c. and the other personal property particularly)* with all and singular the appurtenances to the said tract or parcel of land belonging, or in any wise appertaining, *and the future increase of the females of the said slaves.* and all the estate, right, title, and interest of the said A D, in and to the said granted or intended to be hereby granted tract or parcel of land, and premises: *To have and to hold the said hereby granted or intended to be hereby granted tract or parcel of land and premises, with its appurtenances, together with the aforesaid slaves, and the future increase of the females thereof, and all the other personal property hereby conveyed,* unto the said B T and C T, &c. their heirs, executors, administrators, and assigns, for ever, to the only proper use and behoof of the said B T and C T, &c. their heirs, executors, administrators, and assigns, for ever: *And the said A D, for himself, his heirs, executors, and administrators, doth hereby covenant, promise, and agree, to and with the said B T and C T, &c. their heirs, executors, administrators, and assigns, for ever, in manner and form following,* that is to say, that the said A D, his heirs, executors, and administrators, the aforesaid tract or parcel of land and premises, with their appurtenances, *together with the aforesaid slaves, and the future increase of the females thereof, and all the other personal property hereby conveyed,* unto the said B T and C T, &c. their heirs, executors, administrators, and assigns, against all persons whatever, shall and will warrant and for ever defend, by these presents; *upon trust nevertheless,* that the said B T and C T, &c. their heirs, executors, and administrators, shall permit the said A D to remain in quiet and peaceable possession of the said tract or parcel of land and premises, with its appurtenances, *together with the aforesaid slaves, and other personal property hereby conveyed,* and take the profits thereof to his own use, until default be made in the payment of the said sum of        either in the whole, or in part; and then upon this further trust, that they, or any two, or either of them, or the survivor of them, or the heirs, executors, administrators, or assigns of such survivor, shall and will, so soon after the happening of such default of payment as they, or any, or either of them, or the survivor of them, or the heirs, executors, administrators, or assigns of such survivor, may think proper, or the said E C, his executors, administrators, or assigns, shall request, sell the said tract of land and premises, with the appurtenances, *together with the aforesaid slaves, and the increase of the females thereof, and all the other personal property hereby conveyed,* or such part of the hereby granted premises, as the trustee or trustees, or their representatives, hereby authorised to act, shall think sufficient for the purpose, and shall think proper to sell to the highest bidder for ready money, at public auction, after having fixed the time and place of sale, at their own discretion, and given        days notice thereof, in one or more of the newspapers printed in        and also notified the same, by advertisement, to be set up at the door of the court-house of        county, on some court day previous to the day of sale: *And out of the monies arising from such sale shall, after satisfying the charges thereof,*

and all other expences attending the premises, pay to the said E C, his executors, administrators, or assigns, the said sum of                      with the interest which may thereon lawfully have accrued; and the balance, if any, shall pay to the said A D, his heirs, executors, administrators, or assigns: *But* if the whole of the said sum of                      shall be fully paid off and discharged to the said E C, his executors, administrators, or assigns, on or before the                      day of                      in the year                      when the same is payable, so that no default of payment of the said sum of                      be made, then this indenture to be void, or else to remain in full force and virtue. *In witness* whereof, the said parties to these presents have hereunto set their hands and affixed their seals, the day and year first above written.

*Sealed and delivered, }*  
*in presence of                      }*

(*There must be three witnesses, at least.*)

✎ If the deed of trust embrace *lands* only, then whatever relates to slaves and personal estate must be omitted; also the words printed in *italics*; and if there be *slaves*, but no *females*, then whatever relates to the *future increase* must of course be omitted.

✎ The above form is drawn to suit the case of two or more trustees, which is most usual, but it may easily be varied, so as to be applicable to cases where there is but one. If there be slaves only, or personal estate only, then such parts of the above form may be selected, as applies to the species of property conveyed.

## WILLS.

### *A will of real and personal estate.*

I, A B, of                      do hereby make my last will and testament in manner and form following, that is to say:

1st. I *desire* that all the perishable part of my estate be immediately sold after my decease, and out of the monies arising therefrom, all my just debts and funeral expences be paid. Should the perishable part of my property prove insufficient for the above purposes, then I desire that my executors, \* hereafter named, may sell my houses and lots lying on                      street, in the town of                      and out of the monies arising therefrom pay and satisfy such of my just debts, as shall remain unpaid out of the sales of the perishable part of my estate.

2dly. *After* the payment of my debts and funeral expences, I give to my wife C B one third part of my estate, both real and personal, for and during the term of her natural life, and after her decease, I

\* See Co. Litt. 113, a. as to the operation of law on a devise to executors to sell, and a direction that executors shall sell. See also, in the same folio, Note (2) a very valuable note by Mr. Hargrave on that distinction.

give the same to my children herein after mentioned, equally to be divided among them; and to be enjoyed by them for ever.

3dly. I give to my son D B all my lands in to him and his heirs for ever.

4thly. I give to my son E B all my \* estate in the county of †

5thly. I give to my daughter F B, her executors and administrators, ten thousand dollars, being part of my *six per cent.* stock, now standing in my name in the books of commissioner of loans for the state of Virginia.

6thly. I give to my daughter G B all the residue of my six per cent. stock, also all other my funded debt of the United States, standing in my name on the books of commissioner of loans for the state of Virginia.

7thly. All the rest of my estate, both real and personal, of what nature or kind soever it may be, not herein before particularly disposed of, I desire may be equally divided among my several children herein before named, which I give to them, their heirs, executors, administrators, and assigns, for ever.

And, lastly, I do hereby constitute and appoint my friends H B and J B executors of this my last will and testament, hereby revoking all other or former wills or testaments by me heretofore made.

In witness whereof, I have hereunto set my hand and affixed my seal, this day of in the year &c.

A B. [Seal.]

Signed, sealed, published, and declared, as  
and for the last will and testament of  
the above named A B, in presence of us, }

To be attested by two or more credible witnesses, in the testator's presence, and by his directions, by *Virginia Laws*, (ch. 92, sect. 1) p. 160, of 1 *Rev. Code*.

As our act of assembly differs in nothing from the statute of 29 *Char. 2*, ch. 3, sect. 5, except in the number of witnesses necessary to

\* See as to what passes by the words "estate" or "estates," 3 *Med. Rep.* (5th ed. by Mr. Leach) 45, and the cases there cited, also 3 *Com. Dig.* 422. 426. As to the word "estates," see 2 *Term Rep.* 656. "All my estate" passes every thing a man has, *Dict. per Ld. Mansfield*, in the case of *Hogan and Jackson*. *Cowp.* 306. See also 2 *Burr.* 880. See where a fee passes without using the word estate. 1 *Wills.* 133. I have introduced the above clause merely to shew what constructions have been put on similar devises; not that I think it would be safe to copy it as a precedent: it being a fixed principle, that an heir at law shall not be disinherited by the clearest intention appearing on the face of the will, unless the estate is completely disposed of to somebody else. See as to this point, *Cowp.* 657, *Denn ex dem. Gaskin v. Gaskin*.

† Since the act of 1785, which took effect the 1st day of January, 1787 (see 1 *Rev. Code*, ch. 90, sect. 12, p. 159) an estate of inheritance will pass without the use of such words of perpetuity, as were thentofore deemed necessary. And indeed, in cases arising under wills made before the passing of that act, much greater liberality has been allowed than formerly, in construing devises to carry a fee, in order to effectuate the intention of the testator. See 1 *Wash.* 96, *Kegnon v. Mc Roberts*: and the cases of *Wyatt v. Sadler*, and others, and *Johnson v. Johnson*, and others, decided at the April term, 1810, and will probably be reported in 5 *Hen. & Munf.*

attest a will (that statute requiring *three*) the following determinations founded on that act will not be improper in this place.

If the will be attested by an insufficient number of witnesses, and afterwards a codicil is made, which is also attested by an insufficient number, but the two together would make the number required by this statute, yet it is not a sufficient attestation within the law. But if a man publish his will in the presence of an insufficient number of witnesses, and a month after he send for others, making in the whole the number required by law, it will be good. *Carth. 35, 2, 106.*

It is not necessary that the testator should *sign* the will in the presence of the witnesses, it is sufficient if he *acknowledge* the signature to them, though at different times; the statute requires attesting in the testator's presence, to prevent obtruding another will in the place of the true one. But it is enough that the testator *might see*, it is not necessary that he should *actually see* them sign; therefore, where the testator had desired the witnesses to go into another room seven yards distance to attest the will, in which there was a window broken, through which the testator might see them, it was held good; so if the testator, being sick, should be in bed, and the curtains drawn. 3 *P. Williams, 254. 2 Vez. 454. Salk. 688.*

So where the testatrix went to her attorney's office to execute her will, but being asthmatical, and the office very hot, retired to her carriage to execute it, the witnesses attending her; after having seen the execution, they retired into the office to attest it, and the carriage was put back to the window of the office, through which it was sworn by a person in the carriage, that the testatrix might see what passed. Immediately after the execution, the witnesses took the will to her, which she folded up and put in her pocket, the will was held to be well attested. 1 *Brown's Cha. Ca 99. Casson v. Dyde.*

But if the witnesses subscribe their names to the will in a room adjoining to that where the testator is, but out of his sight, it is not a good attestation. *Gilb. Dev. 93.*

If the testator is in a state of insensibility when his will is attested, the will is not duly attested according to the meaning of the statute, although he is corporally present. *Doug. 229.*

It is not necessary that the witnesses should attest in the presence of each other, or that the testator should declare the instrument he executed to be his will, or that the witnesses should attest every page, folio, or sheet, or that they should know the contents; or that each folio, page, or sheet, should be particularly shewn to them, and if the testator never executed the first sheet, if it was in the room at the time of the execution of the second, it is sufficient. 3 *Burr. 1775.*

Signing need not be by writing the name at the bottom, it is enough if the will be of the testator's hand-writing, and begin with I, J B, &c. 3 *Lev. 1.*

With respect to the revocation of a will, the following determinations have been made.

A will revoked by a subsequent will, but not cancelled, is re-established by cancelling the subsequent will. 4 *Burr. 214. Doug. 41.*

Where there are duplicates of a will, one in the testator's custody, the other not; the cancelling the one in his custody is an effectual cancelling of both. *Cowp. 49. Doug. 41.*



If the testator slightly tears his will, and throws it on the fire, with a deliberate intention to consume it, and it falls off and is preserved, without the testator's knowledge or consent, it is revoked. 2 *Black. Rep.* 1043. Any implied revocation of a will may be rebutted by parol evidence. *Doug* 38.

Marriage and the birth of a child amount to a revocation of a man's will, if it is of all his lands; and a woman's marriage is alone a revocation of her will 4 *Burr.* 217. *Doug* 38. 2 *Term Rep.* 684.

Any alteration or new modelling of the estates devised, is a revocation. 3 *Atk.* 803.

As it is usual to begin the preamble or introductory part of a will with more solemnity than is observed in the foregoing precedent; for the gratification of those who wish to indulge themselves in this kind of devotion, I have added the following:

In the name of God, Amen. I, J S, of the county of            being sick and weak in body, but of sound mind and disposing memory (for which I thank God) and calling to mind the uncertainty of human life, and being desirous to dispose of all such worldly estate \* as it hath pleased God to bless me with—I give and bequeath the same in manner following, that is to say, I give &c. *Item*, I give &c. (here insert the several legacies agreeable to the intention of the testator.)

Before I dismiss a subject so generally useful to the community, as the doctrine of devises, particularly of lands; I think it necessary to caution the public against a practice which too frequently prevails, of intrusting the disposition of their property, by will, to persons wholly unacquainted with the legal operation of the words made use of in such disposition. For although the courts will resort to every mode of construction to carry into effect the intentions of the testator, as appears by the cases before referred to under this title, and many others which might be enumerated; yet, if it cannot be collected from the whole of the will taken together, or from some expressions made use of in it, that the estate is *completely* disposed of to some other person, the heir at law will inherit, notwithstanding the testator evidently meant to exclude him by giving some small pecuniary legacy. A remarkable instance of this kind we have in the case of *Denn ex dem. Gaskin v. Gaskin*, reported in *Cowper*, p. 657; where the testator devises thus: "As to all such worldly estate as God has endued me with, I give and bequeath as follows: I give and devise *All that my freehold messuage and tenement lying in G, together with all houses, &c. and appurtenances whatsoever* belonging to the same, to M R, G R, and T R, *equally*. And among other pecuniary legacies, he bequeaths *ten shillings* to his heir at law." Here, though it is apparent the testator intended to disinherit his heir at law (having no other land except that devised, and giving but *ten shillings*) yet, as no limitation of the estate to the devisees of M R, G R, and T R, was either added to the devise, or could be collected from the will, it was held they took an estate for *life* only, and the heir at law recovered.

\* See as to the use which is made of the introductory words of a will in explaining the intention of the testator, in *Cowp.* 299, *Hogan, &c. v. Jackson*, and the cases there cited. *Cowp.* 352, *Lovescrea ex dem. Mudge v. Blight, &c. ex. Cowp.* 657, *Denn. ex dem. Gaskin v. Gaskin*.

In the first precedent under this title I have endeavoured, by introducing various modes of expression, to shew how far the law has dispensed with technical words in favour of the intention of the testator. But I would by no means recommend a reliance on the indulgence of a court, whose decisions may vary (even after extending the utmost latitude allowed by the law in favour of the devise) materially from the real intention of the testator. It should, therefore, always be a fixed rule to ascertain by some mode of expression the *quantity* and *quality* of the estate devised. *Technical* words, it is true, are not necessary in a will; but where they are not used, some words of limitation must be added, otherwise the law presumes the testator meant to convey an estate for life only, and the heir at law will inherit.

☞ See the case in *Cowper* 657. Also *Cowp.* 238.

☞ But see now the cases of *Kennon v. Mc Roberts*, 1 *Wash.* 96, *Wyatt v. Sadler* and others, and *Johnson v. Johnson* and others, decided at the April term of 1810, of the supreme court of appeals, of Virginia, and will probably be reported in the 5th vol. of *Hen. & Munf. Reports*. See also the case of *Lambert's lessee v. Payne*, in the supreme court of the United States, reported in 3 *Cranch*, where the former decisions are considerably shaken, and a fee held to pass, under a devise which formerly would not have carried a fee.

# APPENDIX, No. II.

TO THE

*NEW VIRGINIA JUSTICE, &c.*

CONTAINING

THE DUTIES OF A JUSTICE OF THE PEACE,

ARISING UNDER THE

LAWS OF THE UNITED STATES.

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THE jurisdiction of a justice of the peace, in offences committed against the United States, is authorised by an act of September twenty-fourth, 1789 (*Laws U. S.* vol i. p. 72, sect. 33.) which enacts, "That for any crime or offence against the United States, the offender may, by any justice or judge of the United States, or by any justice of the peace, or other magistrate of any of the United States. where he may be found, agreeably to the usual mode of process against offenders in such state, and at the expence of the United States. be arrested, and imprisoned or bailed, as the case may be, for trial before such court of the United States, as by this act has cognizance of the offence : and copies of the process shall be returned as speedily as may be into the clerk's office of such court. together with the recognizances of the witnesses for their appearance to testify in the case ; which recognizances the magistrate, before whom the examination shall be, may require, on pain of imprisonment And if such commitment of the offender, or the witnesses, shall be in a district other than that in which the offence is to be tried, it shall be the duty of the judge of that district where the delinquent is imprisoned, seasonably to issue, and of the marshal of the same district to execute, a warrant for the removal of the offender, and the witnesses, or either of them, as the case may be, to the district in which the trial is to be had. And upon all arrests in criminal cases bail shall be admitted, except where the punishment may be death, in which cases it shall not be admitted but by the supreme or a circuit court, or by a justice of the supreme court, or a

judge of a district court, who shall exercise their discretion therein, regarding the nature and circumstances of the offence, and of the evidence, and the usages of law. And if a person committed by a justice of the supreme or a judge of a district court, for an offence not punishable with death, shall afterwards procure bail, and there be no judge of the United States in the district to take the same, it may be taken by any judge of the supreme or superior court of law of such state."

By the ninth section of the above recited law, the district courts of the United States have, "exclusively of the courts of the several states, cognizance of all crimes and offences that shall be cognizable under the authority of the United States, committed within their respective districts, or upon the high seas; where no other punishment than whipping, not exceeding thirty stripes, a fine not exceeding one hundred dollars, or a term of imprisonment not exceeding six months is to be inflicted."

By the eleventh section, the circuit courts of the United States have "exclusive cognizance of all crimes and offences, cognizable under the authority of the United States (except where it is otherwise directed by the said act, or the laws of the United States otherwise provide) and concurrent jurisdiction with the district courts of the crimes and offences cognizable therein."

ACCESSARIES. See PIRACY.

## AMBASSADORS.


BY the act of April thirtieth, 1790 (*Laws U. S.* vol. i. p. 110, sect. 25.) "If any writ or process shall at any time hereafter be sued forth or prosecuted by any person or persons, in any of the courts of the United States, or in any of the courts of a particular state, or by any judge or justice therein respectively, whereby the person of any ambassador or other public minister of any foreign prince or state, authorised and received as such by the president of the United States, or any domestic or domestic servant of any such ambassador or other public minister, may be arrested or imprisoned, or his or their goods or chattels be distrained, seized or attached, such writ or process shall be deemed and adjudged to be utterly null and void, to all intents, constructions and purposes whatsoever."

Sect 26. "In case any person or persons shall sue forth or prosecute any such writ or process, such person or persons, and all attorneys or solicitors prosecuting or soliciting in such case, and all officers executing any such writ or process, being thereof convicted, shall be deemed violators of the laws of nations, and disturbers of the public repose, and imprisoned, not exceeding three years, and fined at the discretion of the court: *Provided*, that no citizen or inhabitant of the United States, who shall have contracted debts prior to his ente

into the service of any ambassador or other public minister, which debts shall be still due and unpaid. shall have, take, or receive any benefit of this act; nor shall any person be proceeded against, by virtue of this act, for having arrested or sued any other domestic servant of any ambassador, unless the name of such servant be first registered in the office of secretary of state, and by such secretary transmitted to the marshal of the district in which congress shall reside, who shall, upon receipt thereof, affix the same in some public place in his office, whereto all persons may resort, and take copies, without fee or reward."

Sect. 27. "If any person shall violate any safe conduct or passport duly obtained and issued under the authority of the United States, or shall assault, strike, wound, imprison, or in any other manner infract the law of nations, by offering violence to the person of an ambassador or other public minister, such person, so offending, on conviction, shall be imprisoned not exceeding three years, and fined at the discretion of the court."

## BAIL.

 FOR admitting to bail, in a criminal offence, see the first page of this *Appendix*.

"In all cases in which suits or prosecutions shall be commenced for the recovery of pecuniary penalties, prescribed by the laws of the United States, the person or persons, against whom process may be issued, shall be held to special bail, subject to the rules and regulations which prevail in civil suits, in which special bail is required." *Laws U. S.* vol. ii. p. 180, sect. 3.

The clerks of the district and circuit courts, in the absence, or in case of the disability of the judges, may take recognizance of special bail, *de bene esse*, in any action depending in either of the said courts. *Ibid.* p. 109, sect. 10.

Bail for appearance in any court of the United States in any criminal cause, in which bail is by law allowed, may be taken by any judge of the United States, any chancellor, judge of a supreme or superior court, or chief or first judge of a court of common pleas of any state, or mayor of a city, in either of them, &c. Not to extend to the allowance of bail, where the punishment is death, nor to abridge any power heretofore given by the laws of the United States to any description of persons to take bail. *Ibid.* p. 227.

How bail may be relieved, where the principal is committed to jail in another district. *Ibid.* vol. iv. p. 492.

In what cases to be given, on removing a cause from a state court, to the circuit court of the United States. See *Laws. U. S.* vol. i. p. 56, sect. 12.

## BRIBERY.

BY the *Laws of the United States* (first congress, second session, ch. 9, sect. 21.) "If a person shall, directly or indirectly, give any sum or sums of money, or any other bribe, present or reward, or any promise, contract, obligation or security, for the payment or delivery of any money, present or reward, or any other thing, to obtain or procure the opinion, judgment or decree. of any judge or judges of the United States, in any suit, controversy, matter or cause, depending before him or them, and shall be thereof convicted, such person or persons, so giving, promising, contracting, or securing to be given, paid or delivered, any sum or sums of money, present, reward, or other bribe as aforesaid, and the judge or judges, who shall in any wise accept or receive the same. on conviction thereof, shall be fined and imprisoned at the direction of the court, and shall for ever be disqualified to hold any office of honour, trust, or profit, under the United States."

The penalty for bribery in an officer of the customs is a fine not less than two hundred dollars, or more than two thousand, and the same in the person giving the bribe. See *Laws U. S.* (first congress) ch. 35, sect. 66.

CITIZENSHIP. See NATURALIZATION.

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## CLERGY. [BENEFIT OF]

BY the *Law of the United States* of April thirtieth, 1790 (vol. i. p. 113.) "The benefit of clergy shall not be used or allowed upon conviction of any crime, for which, by any statute of the United States, the punishment is or shall be declared to be death."

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## COIN.

THE following table of coins, as established by act of congress, is selected from the laws of the United States (second congress, first session, ch. 16, sect. 9. *Laws U. S.* vol. ii. p. 40. *Ibid.* p. 158. Vol.

iii. p. 224.) The penalty for counterfeiting coins may be seen under title COIN, in the body of this work.

Denominations.		Value.	Weight in stand- ard money
Gold	{ Eagle	10 dollars	270 Grains
	{ Half Eagle	5	135
	{ Quarter Eagle	$2\frac{1}{2}$	$67\frac{1}{2}$
	{ Dollar or Unit	A Spanish milled dollar	416
Silver	{ Half Dollar	Half a dollar	208
	{ Quarter Dollar	One fourth of a dollar	104
	{ Dimes	One tenth of a dollar	$41\frac{1}{2}$
	{ Half Dimes	One twentieth of a dollar	$20\frac{1}{2}$
Copper	{ Cents	One hundredth of a dollar	208
	{ Half Cents	Half a cent	104

Proportional value of gold to silver is, fifteen to one.  
Standard of gold coin is, eleven parts fine to one alloy.  
Standard of silver is, 1485 parts fine to 179 alloy.

*Table of Coins.*

10 mills make 1 cent—10 cents 1 disme—10 dismes 1 dollar.

For the penalty for counterfeiting current coin of the United States, see *Laws United States* vol. viii. p. 149.) That act not to deprive the state courts of jurisdiction. *Ibid.* p. 151, sect. 4.

## COPY-RIGHT.

AS to the mode of securing copy-rights to books, maps, &c. see *Laws United States*, vol. i. p. 118, and vol. vi. p. 114.

## COUNTERFEITING.

FOR the offence of counterfeiting notes of the bank of the United States, see *Laws United States* (vol. iv. p. 152. amended, vol. viii. p. 257.) The first mentioned law is remarkably defective.

Counterfeiting public securities of the United States. *Laws U. S.* vol. i. p. 105, sect. 14.

## CRIMINALS.

CONGRESS, by a resolution of the twenty-third of September, 1789, recommended it to the legislatures of the several states, to permit the introduction of the United States prisoners in their respective jails, allowing for the use of them fifty cents a month. (See *Laws U. S.* vol. i. p. 362.) And by a resolution of the third of March, 1791, it was provided, that where any of the states had not complied with this request, the marshal should hire a house for the purpose. (*Ibid.* p. 357.) In consequence of the above recommendation, the legislature of Virginia passed a law, making it the duty of the keepers of jails in this state to receive prisoners committed under the authority of the United States. See *1 Rev. Code*, ch. 41, p. 43; amended by ch. 184, p. 342.

DISSECTION OF DEAD BODIES. See MURDER.

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## DUTIES.

THE laws of the United States, on the subject of duties, are so numerous, and so few of the justices of the peace, from their local situations, could be called on to act in their official character in relation to them, that I have deemed it unnecessary to insert any forms under this title; in the few cases which may occur, precedents can easily be framed.

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## EVIDENCE.

BY the *Laws of the United States* (vol. i. p. 68. first congress, first session, ch. 20, sect. 30.) "The mode of proof by oral testimony, and examination of witnesses in open court, shall be the same in all the courts of the United States, as well in the trial of causes in equity and of admiralty, and maritime jurisdiction, as of actions at common law. And when the testimony of any person shall be necessary in any civil



cause, depending in any district court of the United States, who shall live at a greater distance from the place of trial than one hundred miles, or is bound on a voyage to sea, or is about to go out of the United States, or out of such district, and to a greater distance from the place of trial than as aforesaid, before the time of trial, or is ancient or very infirm, the deposition of such person may be taken *de bene esse* before any justice or judge of any of the courts of the United States, or before any chancellor, justice or judge of a supreme or superior court, mayor or chief magistrate of a city, or judge of a county court, or court of common pleas of any of the United States, not being of counsel or attorney to either of the parties, or interested in the event of the cause; provided that a notification (a) from the magistrate, before whom the deposition is to be taken, to the adverse party, to be present at the taking of the same, and to put interrogatories, if he think fit, be first made out and served on the adverse party or his attorney, as either may be nearest, if either is within one hundred miles of the place of such caption, allowing time for their attendance after notified, not less than at the rate of one day. Sundays exclusive, for every twenty miles travel. And in causes of admiralty and maritime jurisdiction, or other cases of seizure, when a libel shall be filed, in which an adverse party is not named, and depositions of persons circumstanced as aforesaid shall be taken before a claim be put in, the like notification as aforesaid shall be given to the person having the agency or possession of the property libelled at the time of the capture or seizure of the same, if known to the libellant. And every person deposing as aforesaid shall be carefully examined and cautioned, and sworn or affirmed to testify the whole truth, and shall subscribe the testimony by him or her given, after the same be done only by the magistrate taking the deposition, or by the deponent in his presence. And the depositions so taken shall be retained by such magistrate until he deliver the same with his own hand into the court for which they are taken, or shall, together with a certificate (b) of the reasons as aforesaid of their being taken, and of the notice, if any, given to the adverse party, be by him the said magistrate sealed up and directed to such court, and remain under his seal until opened in court. And any person may be compelled to appear and depose as aforesaid (c) in the same manner as to appear and testify in court. And in the trial of any cause of admiralty or maritime jurisdiction in a district court, the decree in which may be appealed from, if either party shall suggest to and satisfy the court, that probably it will not be in his power to produce the witnesses there testifying before the circuit court, should an appeal be had, and shall move that their testimony be taken down in writing, it shall be so done by the clerk of this court. And if an appeal be had, such testimony may be used on the trial of the same, if it shall appear to the satisfaction of the court which shall try the appeal, that the witnesses are dead or gone out of the United States, or to a greater distance than as aforesaid, from the place where the court is sitting, or that by reason of age, sickness, bodily infirmity, or imprisonment, they are unable to travel and appear at court, but not otherwise. And unless the same shall be made to appear on the trial of any cause, with respect to witnesses where depositions may have been taken therein, such depositions shall not be admitted or

used in the cause. *Provided*, that nothing herein shall be construed to prevent any court of the United States from granting a *dedimus potestatem*, to take depositions according to common usage, when it may be necessary to prevent a failure or delay of justice: which power they shall severally possess; nor to extend to depositions taken in *perpetuam rei memoriam*, which, if they relate to matters that may be cognizable in any court of the United States, a circuit court, on application thereto made as a court of equity, may, according to the usages in chancery, direct to be taken."

(a) *Notification of the magistrate before whom a deposition is taken.*

State of \_\_\_\_\_, county, to wit.

Whereas A P, of &c. hath this day given information to me, J P, a judge of the county court of \_\_\_\_\_ [or, if any other office, name it] that B W, of &c. is a material witness for him in a suit now depending in \_\_\_\_\_ court of the United States, for the district of [mention the court, whether district or circuit] in which the said A P is plaintiff, and C D, of &c. is defendant, and that the said B W resides at a greater distance from the place of trial than one hundred miles; [or, if the witness is in any other manner circumstanced which will authorize the taking of his deposition under the above recited law, mention it] and the said A P having made application to me to take the deposition of the said B W, *de bene esse*, pursuant to the act of the congress of the United States in that case made and provided; these are to give you notice, that I shall proceed to take the deposition of the said B W, on the \_\_\_\_\_ day of \_\_\_\_\_ next, at the house of \_\_\_\_\_ in the town (or county) of \_\_\_\_\_ between the hours of ten in the morning and six in the evening of the same day, when and where you may be present, to put interrogatories, if you think fit. Given under my hand, this \_\_\_\_\_ day of \_\_\_\_\_ in the year \_\_\_\_\_ and of the independence of the United States of America the \_\_\_\_\_\* J P.

To C D, of &c.

(b) *Certificate of the magistrate, to be inclosed to the court, together with the deposition.*

State of \_\_\_\_\_, county, to wit.

I, J P, a judge of the county court of \_\_\_\_\_ in the state aforesaid, [or other office, as the case may be] do hereby certify, that the deposition of B W, of &c. herewith sent, was taken by me according to law, at the request of A P, of &c. who alledged that the said B W was

\* A copy of this notice should be served on the adverse party, within the time limited by the above recited act, and on the back of the notice itself, a certificate should be made by a magistrate, to the following effect, viz.

"\_\_\_\_\_ to wit. This day \_\_\_\_\_ personally appeared before me, J P, a justice of the peace for the county of \_\_\_\_\_ in the state of \_\_\_\_\_ and made oath, that on the \_\_\_\_\_ day of \_\_\_\_\_ last, he delivered to the within named C D a true copy of the within notice. Given &c. J P.

a material witness for him, in a cause now depending in the court of the United States for the district of                      wherein the said A P is plaintiff, and C D is defendant, and that the said B W lived at a greater distance from the place of trial than one hundred miles [or, *if for any other reason, mention it*] and I do moreover certify, that I directed a copy of the within notice to be served on the said C D, which appears to have been done, from a certificate on the back of the notice now inclosed. Given under my hand, this                      day of                      in the year                      and of the independence of the United States of America the                      J P.

To                      court of the United States]  
for the district of                      ]

*(c) Summons for the witness to appear before the magistrate, to be examined.*

Between A P, plaintiff, } In the                      court of the United  
and C D, defendant, } States for the district of                      .

Whereas, in pursuance of the act of Congress of the United States, in that case made and provided, A P, of &c. hath made application to me, J P, a judge of the county court of                      [or other office] to take depositions of the witnesses, whose names are hereunto subjoined, he, the said A P, having given me information that their testimony was material in a cause now depending in the                      court of the United States for the district of                      [name the court] in which the said A P is plaintiff, and C D is defendant, and that the said witnesses live at a greater distance from the place of trial than one hundred miles [or, *if for any other reason, name it*] these are to will and require you personally to be and appear before me, on the                      day of                      next, at the house of                      in the town (or county) of                      between the hours of ten in the morning and six in the evening of the same day, then and there to be examined, and to testify your knowledge for and on behalf of the plaintiff; and you are then and there to attend, and not to depart until you have been examined on the part of the said plaintiff: And herein you are not to fail. Given &c.                      J P.

To B W, C W, &c.

*Of the authentication of public acts, records, office books, and judicial proceedings, in one state, so as to be evidence in another.*

"The acts of the legislatures of the several states shall be authenticated by having the seal of their respective states affixed thereto: That the records and judicial proceedings of the courts of any state shall be proved or admitted in any other court within the United

\* It seems to be necessary for the magistrate to return to court the notice, with a certificate of the oath of some person thereon, that a true copy was delivered to the adverse party.

States, by the attestation of the clerk, and the seal of the court annexed, if there be a seal, together with a certificate of the judge, chief justice, or presiding magistrate, as the case may be, that the said attestation is in due form: And the said records and judicial proceedings, authenticated as aforesaid, shall have such faith and credit given to them in every court within the United States, as they have by law or usage in the courts of the state from whence the said records are or shall be taken" *L. U. S.* vol. 1, p. 115.

*Laws of U. S.* vol. 7, p. 152, sect. 1. "All records and exemplifications of office books, which are or may be kept in any public office of any state, not appertaining to a court, shall be proved or admitted in any other court or office in any other state, by the attestation of the keeper of the said records or books, and the seal of his office thereto annexed, if there be a seal, together with a certificate of the presiding justice of the court of the county or district, as the case may be, in which such office is or may be kept; or of the governor, the secretary of state, the chancellor, or the keeper of the great seal of the state, that the said attestation is in due form, and by the proper officer; and the said certificate, if given by the presiding justice of a court, shall be further authenticated by the clerk or prothonotary of the said court, who shall certify under his hand and the seal of his office, that the said presiding justice is duly commissioned and qualified; or, if the said certificate be given by the governor, the secretary of state, the chancellor, or keeper of the great seal, it shall be under the *great seal* of the state in which the said certificate is made. And the said records and exemplifications, authenticated as aforesaid, shall have such faith and credit given to them in every court and office within the United States, as they have by law or usage in the courts or offices of the state from whence the same are or shall be taken.

Sect. 2. "All the provisions of this act, and the act to which this is a supplement, shall apply as well to the public acts, records, office books, judicial proceedings, courts and offices of the respective territories of the United States, and countries subject to the jurisdiction of the United States, as to the public acts, records, office books, judicial proceedings, courts and offices of the several states.

### *Attestation of a record.*

1. *Let the clerk attest the record, in the usual form, under his hand and the seal of his office.*

2. *Let the presiding justice certify it in the following form:*


State of \_\_\_\_\_, county, to wit.

I, J P, presiding justice of the court of \_\_\_\_\_ county, in the state aforesaid, do hereby certify, that the attestation hereto annexed, made by J C, clerk of the said court, is in due form, and by the proper officer appointed by the laws of the said state for that purpose, and that full faith and credit is due thereto in every court or office in the United States. Given under my hand, at the county of \_\_\_\_\_ in the state of \_\_\_\_\_ aforesaid, this \_\_\_\_\_ day of \_\_\_\_\_ in the year \_\_\_\_\_ and of the independence of the United States the \_\_\_\_\_ J P.

3. *Further certificate of the clerk.*

State of \_\_\_\_\_, county, to wit.

I, J C, clerk of the county court of \_\_\_\_\_ in the state aforesaid, do hereby certify, that J P, whose certificate is hereto annexed, is presiding justice of the court of the said county of \_\_\_\_\_ in the state of \_\_\_\_\_ duly commissioned and qualified to the said office, according to the constitution and laws of the said state. Given under my hand, and the seal of my office, this \_\_\_\_\_ day of \_\_\_\_\_ &c.

 The certificate may also be made by the governor, that the attestation of the clerk is *in due form, and by the proper officer*; and in that case, care should be taken to use the *great seal of the state*, and so to be certified.

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## FORFEITURE.


No conviction or judgment for any of the offences (*enumerated in the act of April 30th, 1790, L. U. S. vol. 1, p. 110*) shall work corruption of blood, or any forfeiture of estate. *See sect. 24, of the above law.*

FORFEITURES under the revenue laws, how to be remitted. *See Laws U. S. vol. 1, p. 403; vol. 5, p. 12; vol. 7, p. 127, sect. 3.*

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## FORGERY.

BY the act of April 30th, 1790 (*L. U. S. vol. 1, p. 105*) "If any person or persons shall falsely make, alter, forge, or counterfeit, or cause or procure to be falsely made, altered, forged, or counterfeited, or willingly act or assist in the false making, altering, forging, or counterfeiting any certificate, indent, or other public security of the United States, or shall utter, put off, or cause to be uttered, put off, or offered for payment or for sale, any such false, forged, altered, or counterfeited certificate, indent, or other public security, with intention to defraud any person, knowing the same to be false, altered, forged, or counterfeited, and shall be thereof convicted, every such person shall suffer death."

 For other descriptions of forgery, see the laws referred to under title COUNTERFEITING.

*(a) Warrant for forgery.*

State of \_\_\_\_\_ county, to wit.

Whereas A I, of &c. hath this day given information to me, J P, a justice of the peace for the county of \_\_\_\_\_ in the state aforesaid, that on the \_\_\_\_\_ day of \_\_\_\_\_ last past, at \_\_\_\_\_ in the county of \_\_\_\_\_ aforesaid, in the state aforesaid, A O, of &c. labourer, did offer for sale to \_\_\_\_\_ a forged certificate of the United States, [or, *if for any other offence against the above recited act, mention it*] with intention to defraud the said \_\_\_\_\_ he, the said A O, knowing the said certificate to be forged: These are therefore to require you to apprehend the said A O, and bring him before me, or some other justice of the peace for the county of \_\_\_\_\_ aforesaid, to be dealt with in the premises according to law. Given under my hand and seal, at the county of \_\_\_\_\_ aforesaid, this \_\_\_\_\_ day of \_\_\_\_\_ in the year \_\_\_\_\_ and in the \_\_\_\_\_ year of the independence of the United States of America.

To \_\_\_\_\_ to execute.

NOTE. It is usual either to endorse on the warrant the names of the witnesses, or to annex their names to the foot of it: The following summons is, however, the most regular mode.

*(b) Summons for a witness.*

State of \_\_\_\_\_ , \_\_\_\_\_ county, to wit.

Whereas A O, of &c. labourer, hath been arrested by my warrant, and is now brought before me for suspicion of having offered for sale a forged certificate of the United States, [*or other fact, as stated in the warrant*] and being informed that A W, of &c. is a material witness to be examined concerning the same: These are to require you to summon the said A W to appear before me, at \_\_\_\_\_ in the said county of \_\_\_\_\_ on the \_\_\_\_\_ day of \_\_\_\_\_ at \_\_\_\_\_ o'clock, of the same day, to testify concerning the same. Given under my hand and seal, this \_\_\_\_\_ day of \_\_\_\_\_ in the year \_\_\_\_\_ and of the independence of the United States the \_\_\_\_\_

To \_\_\_\_\_ to execute.

*(c) Recognizance of the witnesses.*

State of \_\_\_\_\_ , \_\_\_\_\_ county, to wit.

Be it remembered, that on the \_\_\_\_\_ day of \_\_\_\_\_ in the year \_\_\_\_\_ and in the \_\_\_\_\_ year of the independence of the United States of America, A W, of &c. and B W, of &c. personally came before me, J P, a justice of the peace for the county of \_\_\_\_\_ in the state aforesaid, and acknowledged themselves severally to owe to the United States of America \_\_\_\_\_ dollars, of good and lawful money of the said United States, to be made and levied of their and each of their goods and chattels, lands and hereditaments, respectively, if the said A W and B W shall make default in performance of the condition here underwritten. Acknowledged before me, \_\_\_\_\_ J P.

The condition of the above recognizance is such, that if the above bound A W and B W do and shall personally appear before the judges (or justices) of the United States on the first day of the next court, to be held at                      circuit, \* and shall then and there give such testimony as they severally know concerning the offence, wherewith A O, of &c. stands charged, on behalf of the United States, and do not depart without leave of the court, then the above recognizance to be void, else to remain in full force.

(d) *Recognizance of bail.*

State of                      ,                      county, to wit.

Be it remembered, that on the                      day of                      in the year                      and in the                      year of the independence of the United States of America, A O, of &c. labourer, A B, of &c. and B B, of &c. came before me, J P, a justice of the peace † for the county of                      aforesaid, in the state aforesaid, and severally acknowledged themselves indebted to the United States of America, that is to say. the said A O in the sum of                      dollars, and the said A B and B B in the sum of                      dollars each, to be respectively levied of their lands and tenements, goods and chattels, yet upon this condition, that if the said A O shall make default in performance of the condition underwritten.

The condition of this recognizance is such, that if the above bound A O shall personally appear before the United States judges (or justices) on the first day of the next court to be holden at                      for the district of                      [or for the                      circuit] then and there to answer to the said United States of America for and concerning [*here recite the offence*] with which the said A O stands charged before me, and to do and receive what shall by the court be then and there ordered and adjudged, and shall not depart thence without the leave of the said court, then this recognizance shall be void, or else remain in full force and virtue. Acknowledged before me.

(e) *Mittimus.*

State of                      ,                      county, to wit.

To the keeper of the ‡ jail of                      .

I send you herewith the body of A O, of &c. labourer, apprehended by my warrant, and brought before me for felony, that is to say,

\* In those cases where the crime is such as falls under the jurisdiction of the district court of the United States, the precedent should be drawn to suit the case. See the formation and jurisdiction of the courts of the United States, in the acts of Congress, 1 Cong 1 sess. ch. 20.

† It must be observed, that where the punishment for the offence is death, bail cannot be admitted by a justice of the peace, but only by a judge of a superior court. See the first page of this appendix.

‡ In consequence of the resolution of Congress of the 23d of September, 1789 (see L. U S. vol. 1, p. 362) recommending it to the legislatures of the several states to pass laws, making it the duty of the keepers of their jails to receive and keep prisoners committed under the authority of the United States,

[*here recite the offence particularly*] and you, the said keeper of the said jail, are hereby required to receive the said A O into your jail and custody, and him there safely to keep till he shall be thence discharged by due course of the law of the United States. Given under my hand and seal, this       day of       in the year       and in the       year of the independence of the United States of America.

I have purposely inserted under this title such precedents as will serve in other cases, although some of them may not be necessary for a justice of the peace in the particular instance of forgery.

## FUGITIVES.

*By the laws of the U. S. act of February 12, 1793 (vol. 2, p. 165)* Whenever the executive authority of any state in the Union, or of either of the territories north, west, or south of the river Ohio, shall demand any person as a fugitive from justice, of the executive authority of any such state or territory, to which such person shall have fled, and shall moreover produce the copy of an indictment found, or an affidavit made, before a magistrate of any state or territory, as aforesaid, charging the person so demanded with having committed treason, felony, or other crime, certified as authentic by the governor or chief magistrate of the state or territory from whence the person so charged fled, it shall be the duty of the executive authority of the state or territory to which such person shall have fled to cause him or her to be arrested and secured, and notice of the arrest to be given to the executive authority making such demand, or to the agent of such authority appointed to receive the fugitive, and to cause the fugitive to be delivered to such agent when he shall appear: But if no such agent shall appear within six months from the time of the arrest, the prisoner may be discharged. And all costs and expences incurred in the apprehending, securing, and transmitting such fugitive to the state or territory making such demand, shall be paid by such state or territory.

the legislature of Virginia, at their session, next after the passing of the resolution of Congress, passed such law. This, I presume, was done by the other states. The mittimus then must conform to the nature and circumstances of the case, arising as well from the acts of the legislatures of the several states, as from those of Congress. Thus, in offences falling within the jurisdiction of the district court of the United States, it seems, that the *mittimus* should be directed to the keeper of the jail where the court is held: the same observation will apply to the circuit courts of the United States. [*Set their jurisdiction in the first part of this Appendix.*] If the trial is to be had before a special circuit court of the United States, then the proceedings must all be forwarded to such court. See, as to special circuit courts, *L. U. S.* vol. 1, p. 50, sect. 5: vol. 2, p. 226, sect. 3, and the *laws of Virginia*, making it the duty of keepers of jails to receive prisoners committed under the authority of the United States. \* 1 *Rev. Code*, p. 43, 342.



Sect. 2. Any agent, appointed as aforesaid, who shall receive the fugitive into his custody, shall be empowered to transport him or her to the state or territory from which he or she shall have fled. And if any person or persons shall by force set at liberty or rescue the fugitive from such agent, while transporting, as aforesaid, the person or persons so offending shall, on conviction, be fined not exceeding 500 dollars, and be imprisoned not exceeding one year.

Sect. 3. "When a person held to labour in any of the United States, or in either of the territories on the north-west or south of the river Ohio, under the laws thereof, shall escape into any other of the said states or territory, the person to whom such labour or service may be due, his agent or attorney, is hereby empowered to seize or arrest such fugitive from labour, and to take him or her before any judge of the circuit or district courts of the United States, residing or being within the state, or before any magistrate of a county, city, or town corporate, wherein such seizure or arrest shall be made, and upon proof to the satisfaction of such judge or magistrate, either by oral testimony, or affidavit taken before and certified by a magistrate of any such state or territory, that the person so seized or arrested doth, under the laws of the state or territory from which he or she fled, owe service or labour to the person claiming him or her, it shall be the duty of such judge or magistrate to give a certificate thereof to such claimant, his agent, or attorney, which shall be sufficient warrant for removing the said fugitive from labour to the state or territory from which he or she fled."

Sect. 4. "Any person who shall knowingly and willingly obstruct or hinder such claimant, his agent, or attorney, in so seizing or arresting such fugitive from labour, or shall rescue such fugitive from such claimant, his agent, or attorney, when so arrested, pursuant to the authority herein given or declared, or shall harbour or conceal such person, after notice that he or she was a fugitive from labour, as aforesaid, shall, for either of the said offences, forfeit and pay the sum of five hundred dollars. Which penalty may be recovered by and for the benefit of such claimant, by action of debt, in any court proper to try the same, saving moreover, to the person claiming such labour or service, his right of action for or on account of the said injuries, or either of them."

If the owner of such fugitive doth not produce oral testimony in support of his claim, an affidavit to the following effect, taken in the state of which he is an inhabitant, will be necessary.

State of \_\_\_\_\_, county, to wit \_\_\_\_\_.

I, J P, a justice of the peace for the county of \_\_\_\_\_ in the state of \_\_\_\_\_ do hereby certify, that this day A W, B W, &c. of &c. personally came before me, and made oath, that they knew [here mention the name of the fugitive, and describe him as a servant, apprentice, or slave, as the case may be] that the said \_\_\_\_\_ is a person about \_\_\_\_\_ years old, &c. [here describe his age, stature, &c.] and that the said \_\_\_\_\_ under the laws of the said state of \_\_\_\_\_ is a [servant, apprentice, or slave, as the case may be] and oweth service [or labour] to A M, of &c. in the state of \_\_\_\_\_ aforesaid. Given under my hand and seal, at the county of \_\_\_\_\_ in the state of \_\_\_\_\_

aforesaid, this       day of       in the year       and in the  
year of the independence of the United States.

*Warrant of a magistrate to convey the fugitive to the  
state from which he fled.*

State of       ,       county, to wit.

Whereas A M, of       in the state of       hath produced satisfactory proof to me, J P, a justice of the peace for the county of       in the state of       that       (*here mention the name of the fugitive*) who hath been arrested in this state, and brought before me, is a fugitive from the said A M, in the state of       and that the said A M, under the laws of the said state of       is entitled to the services (*or labour*) of the said       : These are therefore to authorise the said A M to remove the said       to the said state of       and for so doing this shall be his sufficient warrant. Given under my hand and seal, this       day of       in the year       and in the year of the independence of the United States of America.

HIGH SEAS....For the trial and punishment of offences committed on the *high seas*, see title PIRACY.

INSOLVENT DEBTORS....How they may be relieved, see *Laws U. S.* vol. iv. p. 121. and vol. v. p. 6.

JAILS....How prisoners committed under the authority of the United States may be received into those of the state, see title CRIMINALS.

JUDICIAL PROCEEDINGS, in the several states, how to be authenticated, see EVIDENCE.

## LARCENY.

BY the act of the thirtieth of April, 1790 (*Laws U. S.* vol. i. p. 106, sect. 16.) "If any person within any of the places under the sole and exclusive jurisdiction of the United States, or upon the high seas, shall take and carry away, with intent to steal or purloin, the personal goods of another; or if any person or persons, having at any time hereafter the charge or custody of any arms, ordnance, munition, shot, powder, or habiliments of war, belonging to the United States, or of any victuals provided for the victualling of any soldiers, gunners, marines, or pioneers, shall for any lucre or gain, wittingly, advisedly, and of purpose, to hinder or impede the service of the United States, embezzle, purloin, or convey away any of the said arms, ordnance, munition, shot or powder, habiliments of war, or victuals, that then, and in every of the cases aforesaid, the person or persons so offending, their counsellors, aiders, and abettors (knowing of and privy to the offences aforesaid) shall, on conviction, be fined not exceeding the four-

fold value of the property so stolen, embezzled, or purloined; the one moiety to be paid to the owner of the goods, or the United States, as the case may be, and the other moiety to the informer and prosecutor, and be publicly whipped, not exceeding thirty-nine stripes."

Sect. 17. "If any person or persons, within any part of the jurisdiction of the United States as aforesaid, shall receive or buy any goods or chattels that shall be feloniously taken or stolen from any other person, knowing the same to be stolen, or shall receive, harbour or conceal any felons or thieves, knowing them to be so, he or they, being of either of the said offences legally convicted, shall be liable to the like punishments, as in the case of larceny before are prescribed."

For Precedents, see title **FORGERY**; observing in the description of the offence to state it to have been committed in a place "under the sole and exclusive jurisdiction of the United States, or upon the high seas, or by a person having charge of the arms, &c. of the United States," (*as the case may be.*)

**LETTERS.** See **MAIL**.

**LIMITATION OF CRIMINAL PROSECUTIONS.** See the latter part of this *Appendix*.

## MAIL.

THE penalties for offences in relation to the post-office establishment and mails have been considerably varied, as may be seen by comparing the act of the eighth of May, 1794 (*Laws U. S.* vol. iii. p. 50, sect. 16, 17.) with that of the second of March, 1792. *Ibid.* vol. iv. p. 511, sect. 14, 15.

Sect. 14. If any person, employed in any of the departments of the general post-office, shall unlawfully detain, delay, or open any letter, packet, bag or mail of letters, with which he shall be entrusted, or which shall have come to his possession, and which are intended to be conveyed by post, or if any such person shall secrete, embezzle, or destroy any letter or packet entrusted to him as aforesaid, and which shall not contain any security for or assurance relating to money, as herein after described, every such offender, being thereof duly convicted, shall, for every such offence, be fined, not exceeding three hundred dollars, or imprisoned, not exceeding six months, or both, according to the circumstances and aggravations of the offence. And if any person employed as aforesaid shall secrete, embezzle, or destroy any letter, packet, bag or mail of letters, with which he shall be entrusted, or which shall have come to his possession, and are intended to be conveyed by post, containing any bank note, or bank post bill, bill of exchange, warrant of the treasury of the United States, note of assignment of stock in the funds, letters of attorney, for receiving

annuities or dividends, or for selling stock in the funds, or for receiving the interest thereof, or any letter of credit, or note, for or relating to payment of monies, or any bond or warrant, draft, bill, or promissory note whatsoever, for the payment of money; or if any such person, employed as aforesaid, shall steal or take any of the same out of any letter, packet, bag or mail of letters, that shall come to his possession, he shall, on conviction for any such offence, be publicly whipped, not exceeding forty stripes, and be imprisoned not exceeding ten years. And if any person, who shall have taken charge of the mail of the United States, shall quit or desert the same, before his arrival at the next post-office, every such person, so offending, shall forfeit and pay a sum not exceeding five hundred dollars for every such offence. And if any person concerned in carrying the mail of the United States shall collect, receive or carry, any letter or packet, or shall cause or procure the same to be done, contrary to this act, every such offender shall forfeit and pay, for every such offence, a sum not exceeding fifty dollars.

Sect. 15. If any person shall rob any carrier of the mail of the United States, or other person entrusted therewith, of such mail, or of part thereof, such offender or offenders shall, on conviction, be publicly whipped, not exceeding forty lashes, and be imprisoned not exceeding ten years; and if convicted a second time of a like offence, he or they shall suffer death: Or, if in effecting such robbery of the mail, the first time, the offender shall much wound the person having custody thereof, or put his life in jeopardy, by the use of dangerous weapons, such offender or offenders shall suffer death. And if any person shall attempt to rob the mail of the United States, by falling upon the person having custody thereof, shooting at him or his horses, or threatening him with dangerous weapons, and the robbery is not effected, every such offender, on conviction thereof, shall be punished by whipping, not exceeding thirty lashes, or with imprisonment, not exceeding two years, or with both, according to the discretion of the court before whom such conviction is had. And if any person shall steal the mail, or shall steal or take from or out of any mail, or from or out of any post office, any letter or packet, or if any person shall take the mail, or any letter or packet therefrom, or from any post-office, whether with or without the consent of the person having custody thereof, and shall open, embezzle, or destroy any such mail, letter, or packet, the same containing any article of value, or evidence of any debt, due, demand, right, or claim, or if any person shall, by fraud or deception, obtain from any person having custody thereof, any mail, letter or packet, containing any article of value, or evidence thereof, such offender or offenders, upon conviction thereof, shall be whipped, not exceeding thirty lashes, or imprisoned, not exceeding two years, or both, at the discretion of the court before whom such conviction is had. And if any person shall take any letter or packet, not containing any article of value, or evidence thereof, out of a post-office, or shall open any letter or packet, which shall have been in a post-office, or in the custody of a mail carrier, before it shall have been delivered to the person to whom it is directed, with design to obstruct the correspondence, to pry into another's business, or secrets, or shall secrete, embezzle, or destroy, any such mail, letter, or pack-

et, such offender, upon conviction, shall pay, for every such offence, a sum not exceeding one hundred dollars. *Provided also, and be it further enacted,* That every person, who shall be imprisoned by a judgment of court under the fourteenth and fifteenth sections of this act, shall be kept at hard labour during the period of such imprisonment.

### *Rates of postage.*

(Laws United States, vol. iv. p. 508.)

For every letter, of a single sheet, conveyed not exceeding forty miles	8 cents.
Over forty and not exceeding ninety	10
Over ninety and not exceeding one hundred and fifty	12½
Over one hundred and fifty and not exceeding three hundred	17
Over three hundred and not exceeding five hundred	20
Over five hundred	25

For every double letter, or one composed of two pieces of paper, double those rates; for a triple letter, or one composed of three pieces of paper, triple those rates; and for every packet composed of four or more pieces of paper, or other things, and weighing one ounce avoirdupoise, quadruple those rates, and in that proportion for all greater weight: *Provided,* that no packet of letters conveyed by the water mails shall be charged with more than quadruple postage.

No post-master shall be obliged to receive, to be conveyed by the mail, any packet which shall weigh more than three pounds.

One news-paper may be sent by each printer to every other printer, free of postage. *Laws U. S.* vol. iv. p. 516. sect. 19.

The postage of news-papers is, one cent for any distance not more than one hundred miles, and one and a half cents for any greater distance: *Provided,* that the postage in the same state shall not exceed one cent. *Ibid.* sect. 20.

The postage of magazines and pamphlets is, one cent a sheet for any distance not exceeding fifty miles, one and a half cents for any distance over fifty, and not exceeding one hundred miles, and two cents for any greater distance.

## MAIMING.

BY act of April thirtieth, 1790 (*Laws U. S.* vol. i. p. 105. sect. 13.) "If any person or persons, within any of the places upon the land under the sole and exclusive jurisdiction of the United States, or upon the high seas, in any vessel belonging to the United States, or to any citizen or citizens thereof, on purpose and of malice aforethought,

shall unlawfully cut off the ear or ears, or cut out or disable the tongue, put out an eye, slit the nose, cut off the nose or a lip, or cut off or disable any limb or member of any person, with intention in so doing to maim or disfigure such person in any the manners before mentioned, then, and in every such case, the person or persons so offending, their counsellors, aiders, and abettors (knowing of and privy to the offence aforesaid) shall, on conviction, be imprisoned not exceeding seven years, and fined not exceeding one thousand dollars."

For precedents, see title **FORGERY**, observing to vary the description of the offence.

## MANSLAUGHTER.

BY act of April thirtieth, 1790 (*Laws U. S.* vol. i. p. 102, sect. 7.) "If any person or persons shall, within any fort, arsenal, dock-yard, magazine, or other place or district of country, under the sole and exclusive jurisdiction of the United States, commit the crime of manslaughter, and shall be thereof convicted, such person or persons shall be imprisoned not exceeding three years, and fined not exceeding one thousand dollars."

The same punishment for manslaughter committed on the high seas. *Laws U. S.* vol. i. p. 104, sect. 12.

For the definition of manslaughter, see title **HOMICIDE**, in the body of this work.

For precedents, see title **FORGERY**, in this *Appendix*.

**MARINERS.** See **SEAMEN**.

**MISPRISON OF FELONY.** See **MURDER**.

## MURDER.

BY act of April thirtieth, 1790 (*Laws U. S.* vol. i. p. 101, sect. 3.) "If any person or persons shall, within any fort, arsenal, dock-yard, magazine, or in any other place or district of country, under the sole and exclusive jurisdiction of the United States, commit the crime of wilful murder, such person or persons, on being thereof convicted, shall suffer death."

Sect. 4. "The court before whom any person shall be convicted of the crime of murder, for which he or she shall be sentenced to suffer death, may, at their discretion, add to the judgment, that the body of such offender shall be delivered to a surgeon for dissection, and the

marshal, who is to cause such sentence to be executed, shall accordingly deliver the body of such offender, after execution done, to such surgeon as the court shall direct, for the purpose aforesaid: *Provided*, that such surgeon, or some other person, by him appointed for the purpose, shall attend to receive and take away the dead body at the time of the execution of such offender."

Sect. 5. If any person or persons shall, after such execution had, by force, rescue, or attempt to rescue the body of such offender out of the custody of the marshal or his officers, during the conveyance of such body to any place for dissection, as aforesaid, or shall, by force, rescue or attempt to rescue, such body from the house of any surgeon, where the same shall have been deposited, in pursuance of this act; every person, so offending, shall be liable to a fine not exceeding one hundred dollars, and an imprisonment not exceeding twelve months.

Sect. 6. "If any person or persons, having knowledge of the actual commission of the crime of wilful murder, or other felony, upon the high seas, or within any fort, arsenal, dock-yard, magazine, or other place or district of country, under the sole and exclusive jurisdiction of the United States, shall conceal, and not as soon as may be disclose and make known the same to some one of the judges, or other persons in civil or military authority under the United States, on conviction thereof, such person or persons shall be adjudged guilty of misprision of felony, and shall be imprisoned not exceeding three years, and fined not exceeding five hundred dollars."

For precedents, see title *FORGERY*, in this *Appendix*, observing to vary the description of the offence, so as to bring it under the above recited law.

For *murder committed on the high seas*, see title *PIRACY*.

## MUTE.

BY act of April thirtieth, 1790 (*Laws U. S.* vol. i. p. 113, sect. 30.) "If any person or persons be indicted of treason against the United States, and shall stand mute, or refuse to plead, or shall challenge peremptorily above the number of thirty-five of the jury; or if any person or persons be indicted of any other of the offences herein before set forth (*viz.* those enumerated in the above law of the United States) for which the punishment is declared to be death, if he or they shall also stand mute, or will not answer directly to the indictment, or challenge peremptorily above the number of twenty-five persons of the jury, the court, in any of the cases aforesaid, shall, notwithstanding, proceed to the trial of the person or persons so standing mute or challenging, as if he or they had pleaded not guilty, and render judgment thereon accordingly."

## NATURALIZATION.

THE laws on this subject have undergone considerable mutations, since the adoption of the constitution of the United States. Those now in force are, the act of April fourteenth, 1802 (*Laws U. S.* vol. vi. p. 74.) amended by that of March twenty-sixth, 1804 (*Ibid.* vol. vii. p. 136.) For the former laws, see act of March twenty-sixth, 1790, act of January twenty-ninth, 1795 (vol. iii. p. 163.) of June eighteenth, 1798 (vol. iv. p. 133.) For the mode of naturalizing aliens, under the old laws of Virginia, see vol. ii. *Stat. at Large, Index*, tit. NATURALIZATION.

## PATENTS.

FOR the laws relating to patents, see act of February twenty-first, 1793 (*Laws U. S.* vol. i. p. 200.) act of April seventeenth, 1800, *Laws U. S.* vol. v. p. 88.

## PERJURY.

BY act of April thirtieth, 1790 (*Laws U. S.* vol. i. p. 108, sect. 18.) "If any person shall wilfully and corruptly commit perjury, or shall by any means procure any person to commit corrupt and wilful perjury, on his or her oath or affirmation, in any suit, controversy, matter or cause, depending in any of the courts of the United States, or in any deposition taken pursuant to the laws of the United States, every person so offending, and being thereof convicted, shall be imprisoned not exceeding three years, and fined not exceeding eight hundred dollars, and shall stand in the pillory for one hour, and be thereafter rendered incapable of giving testimony in any of the courts of the United States, until such time as the judgment so given against the said offender shall be reversed."

Sect. 19. "In every presentment or indictment to be prosecuted against any person for wilful and corrupt perjury, it shall be sufficient to set forth the substance of the offence charged upon the defendant, and by what court, or before whom the oath or affirmation was taken



(averring such court, or person or persons, to have a competent authority to administer the same) together with the proper averment or averments, to falsify the matter or matters wherein the perjury or perjuries is or are assigned; without setting forth the bill, answer, information, indictment, declaration, or any part of any record or proceeding, either in law or equity, other than as aforesaid, and without setting forth the commission or authority of the court, or person or persons before whom the perjury was committed."

Sect. 20. "In every presentment or indictment for subornation of perjury, or for corrupt bargaining or contracting with others to commit wilful and corrupt perjury, it shall be sufficient to set forth the substance of the offence charged upon the defendant, without setting forth the bill, answer, information, indictment, declaration, or any part of any record or proceeding, either in law or equity, and without setting forth the commission or authority of the court, or person or persons before whom the perjury was committed, or was agreed or promised to be committed.

For precedents, see those under title *FORGERY*, in this *Appendix*, the formal parts of which will equally serve for other cases.

## PIRACY.

BY act of April thirtieth, 1790 (*Laws U. S.* vol. i. p. 102, sect. 8.) "If any person or persons shall commit upon the high seas, or in any river, haven, basin or bay, out of the jurisdiction of any particular state, murder or robbery, or any other offence, which, if committed within the body of a county, would, by the laws of the United States, be punishable with death; or if any captain or mariner of any ship or other vessel shall piratically and feloniously run away with such ship or vessel, or any goods or merchandise, to the value of fifty dollars, or yield up such ship or vessel voluntarily to any pirate; or if any seaman shall lay violent hands upon his commander, thereby to hinder and prevent his fighting in defence of his ship or goods committed to his trust, or shall make a revolt in the ship; every such offender shall be deemed, taken and adjudged to be a pirate and felon, and being thereof convicted, shall suffer death; and the trial of crimes committed on the high seas, or in any place out of the jurisdiction of any particular state, shall be in the district where the offender is apprehended, or into which he may first be brought."

Sect. 9. "If any citizen shall commit any piracy or robbery aforesaid, or any act of hostility against the United States, or any citizen thereof, upon the high seas, under colour of any commission from any foreign prince or state, or on pretence of authority from any person, such offender shall, notwithstanding the pretence of any such authority, be deemed, adjudged, and taken to be a pirate, felon, and being thereof convicted, shall suffer death."

Sect. 10. "Every person who shall, either upon the land or the seas, knowingly and wittingly, aid and assist, procure, command, counsel or advise any person or persons to do or commit any murder or robbery, or other piracy as aforesaid, upon the seas, which shall affect the life of such person, and such person or persons shall thereupon do or commit any such piracy or robbery, then all and every such person so as aforesaid aiding, assisting, procuring, commanding, counselling or advising the same, either upon the land or the sea, shall be, and they are hereby declared, deemed, and adjudged to be, accessory to such piracies before the fact, and every such person being thereof convicted, shall suffer death."

Sect. 11. "After any murder, felony, robbery, or other piracy whatsoever aforesaid, is or shall be committed by any pirate or robber, every person, who, knowing that such pirate or robber has done or committed any such piracy or robbery, shall, on the land or at sea, receive, entertain, or conceal any such pirate or robber, or receive or take into his custody any ship, vessel, goods or chattels, which have been by any such pirate or robber piratically and feloniously taken, shall be, and are hereby declared, deemed and adjudged to be, accessory to such piracy or robbery, after the fact; and on conviction thereof, shall be imprisoned not exceeding three years, and fined not exceeding five hundred dollars."

Sect. 12. If any seaman or other person shall commit manslaughter upon the high seas, or confederate, or attempt, or endeavour to corrupt any commander, master, officer or mariner, to yield up or to run away with any ship or vessel, or with any goods, wares, or merchandise, or to turn pirate, or to go over to or confederate with pirates, or in any wise trade with any pirate, knowing him to be such, or shall furnish such pirate with any ammunition, stores, or provisions of any kind, or shall fit out any vessel knowingly, and with a design to trade with or supply, or correspond with any pirate or robber, upon the seas; or if any person or persons shall any ways consult, combine, confederate or correspond, with any pirate or robber on the seas, knowing him to be guilty of any such piracy or robbery; or if any seaman shall confine the master of any ship or other vessel, or endeavour to make a revolt in such ship; such person or persons, so offending, and being thereof convicted, shall be imprisoned not exceeding three years, and fined not exceeding one thousand dollars."

For precedents, see title *FORGERY*, in this *Appendix*, describing the offence so as to bring it under the above law.

*POSTAGE of letters.* See *MAIL*.

*PRISONERS, for debt.* See *INSOLVENT DEBTORS*.

*PRISONERS, for crimes.* See *CRIMINALS*.

## PROCESS.

BY act of April thirtieth, 1790 (*Laws U. S.* vol. i. p. 109, sect. 22.)  
"If any person or persons shall knowingly and wilfully obstruct, resist, or oppose any officer of the United States, in serving, or attempting to serve or execute any mesne process, or warrant, or any rule or order of any of the courts of the United States, or any other legal or judicial writ or process whatsoever, or shall assault, beat or wound any officer, or other person duly authorised, in serving or executing any writ, rule, order, process or warrant aforesaid, every person, so knowingly and wilfully offending in the premises, shall, on conviction thereof, be imprisoned not exceeding twelve months, and fined not exceeding three hundred dollars."

*Public acts of the several states, how to be authenticated. See EVIDENCE.*

## QUARANTINE.

OFFICERS of the United States not to contravene the quarantine laws of the several states, but to assist in their execution. *See Laws U. S.* vol. iv. p. 259.

*Receivers of stolen goods. See LARCENY.*

## RECORDS.

BY act of April thirtieth, 1790 (*Laws U. S.* vol. i. p. 106, sect. 15.)  
"If any person shall feloniously steal, take away, alter, falsify, or otherwise avoid any record, writ, process, or other proceedings in any of the courts of the United States, by means whereof any judgment shall be reversed, made void, or not take effect, or if any person shall acknowledge or procure to be acknowledged, in any of the courts aforesaid, any recognizance, bail or judgment, in the name or names of any other person or persons, not privy or consenting to the same, every such person or persons, on conviction thereof, shall be fined not exceeding five thousand dollars, or be imprisoned not exceeding seven

years, and whipped not exceeding thirty-nine stripes. *Provided*, that this act shall not extend to the acknowledgment of any judgment or judgments, by any attorney or attorneys, duly admitted, for any person or persons against whom any judgment or judgments shall be had or given.

 *For the mode of authenticating the records of the several states,* see EVIDENCE.

## RESCUE.

BY act of April 30th, 1790 (*L. U. S.* vol. 1, p. 110, sect. 23) "If any person or persons shall by force set at liberty or rescue any person who shall be found guilty of treason, murder, or any other capital crime, or rescue any person convicted of any of the said crimes, going to execution, or during execution, every person so offending, and being thereof convicted, shall suffer death: And if any shall by force set at liberty or rescue any person, who before conviction shall stand committed for any of the capital offences aforesaid; or if any person or persons shall by force set at liberty or rescue any person committed for or convicted of any other offence against the United States, every person so offending shall, on conviction, be fined not exceeding five hundred dollars, and imprisoned not exceeding one year."

For precedents of warrants, &c. see title FORGERY, of this Appendix. In every instance observe to describe the offence, as nearly as may be, in the words of the law itself.

ROBBERY, see PIRACY.

ROBBING THE MAIL, see MAIL.

## SEAMEN.

THE act of Congress of July 20th, 1790, entitled "*An act for the government and regulation of seamen in the merchants service*," comprising a variety of subjects which fall within the jurisdiction of a justice of the peace, and being of considerable importance to merchants and others engaged in maritime affairs, it is presumed that a recital of the whole act will be acceptable to many into whose hands this book will fall. (*See L. U. S.* vol. 1, p. 154.)

Sect. 1. *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, "That from and after the first day of December next, every master or commander of any ship or vessel bound from a port in the United States to any fo-

reign port, or of any ship or vessel of the burthen of fifty tons or upwards, bound from a port in one state to a port in any other than an adjoining state, shall, before he proceed on such voyage, make an agreement in writing, or in print, with every seaman or mariner on board such ship or vessel (except such as shall be apprentice or servant to himself or owners) declaring the voyage or voyages, term or terms of time, for which such seaman or mariner shall be shipped. And if any master or commander of such ship or vessel shall carry out any seaman or mariner (except apprentices or servants as aforesaid) without such contract or agreement being first made and signed by the seamen and mariners, such master or commander shall pay to every such seaman or mariner the highest price or wages, which shall have been given at the port or place where such seaman or mariner shall have been shipped, for a similar voyage, within three months next before the time of such shipping: *Provided* such seaman or mariner shall perform such voyage; or if not, then for such time as he shall continue to do duty on board such ship or vessel; and shall moreover forfeit twenty dollars for every such seaman or mariner, one half to the use of the person prosecuting for the same, the other half to the use of the United States: And such seaman or mariner, not having signed such contract, shall not be bound by the regulations, nor subject to the penalties and forfeitures contained in this act.

Sect. 2. "At the foot of every such contract, there shall be a memorandum in writing, of the day and the hour on which such seaman or mariner, who shall so ship and subscribe, shall render themselves on board, to begin the voyage agreed upon. And if any such seaman or mariner shall neglect to render himself on board the ship or vessel for which he has shipped, at the time mentioned in such memorandum, and if the master, commander, or other officer of the ship or vessel, shall, on the day on which such neglect happened, make an entry in the log-book of such ship or vessel of the name of such seaman or mariner, and shall in like manner note the time that he so neglected to render himself (after the time appointed) every such seaman or mariner shall forfeit, for every hour which he shall so neglect to render himself, one day's pay, according to the rate of wages agreed upon, to be deducted out of his wages. And if any such seaman or mariner shall wholly neglect to render himself on board of such ship or vessel, or having rendered himself on board, shall afterwards desert and escape, so that the ship or vessel proceed to sea without him, every such seaman or mariner shall forfeit and pay to the master, owner, or consignee of the said ship or vessel, a sum equal to that which shall have been paid to him by advance at the time of signing the contract, over and besides the sum so advanced, both which sums shall be recoverable in any court, or before any justice or justices of any state, city, town, or county, within the United States, which by the laws thereof have cognizance of debts of equal value, against such seaman or mariner, or his surety or sureties, in case he shall have given surety to proceed the voyage.

Sect. 3. "If the mate or first officer under the master, and a majority of the crew of any ship or vessel, bound on a voyage to any foreign port, shall, after the voyage is begun (and before the ship or vessel shall have left the land) discover that the said ship or vessel is

too leaky, or is otherwise unfit in her crew, body, tackle, apparel, furniture, provisions, or stores, to proceed on the intended voyage, and shall require such unfitness to be inquired into, the master or commander shall, upon the request of the said mate (or other officer) and such majority, forthwith proceed to or stop at the nearest or most convenient port or place where such inquiry can be made, and shall there apply to the judge of the district court, if he shall there reside, or if not, to some justice of the peace of the city, town, or place, taking with him two or more of the said crew who shall have made such request; and thereupon such judge or justice is hereby authorised and required to issue his precept, directed to three persons in the neighbourhood, the most skilful in maritime affairs that can be procured, requiring them to repair on board such ship or vessel, and to examine the same in respect to the defects and insufficiencies complained of, and to make report to him, the said judge or justice, in writing, under their hands, or the hands of two of them, whether in any or in what respect the said ship or vessel is unfit to proceed on the intended voyage, and what addition of men, provisions, or stores, or what repairs or alterations in the body, tackle, or apparel, will be necessary; and upon such report the said judge or justice shall adjudge and determine, and shall endorse on the the said report his judgment, whether the said ship or vessel is fit to proceed on the intended voyage, and if not, whether such repairs can be made or deficiencies supplied where the ship or vessel then lays, or whether it be necessary for the said ship or vessel to return to the port from whence she first sailed, to be there refitted; and the master and crew shall in all things conform to the said judgment; and the master or commander shall, in the first instance, pay all the costs of such view, report, and judgment, to be taxed and allowed on a fair copy thereof certified by the said judge or justice. But if the complaint of the said crew shall appear, upon the said report and judgment, to have been without foundation, then the said master, or the owner or consignee of such ship or vessel, shall deduct the amount thereof, and of reasonable damages for the detention (to be ascertained by the said judge or justice) out of the wages growing due to the complaining seamen or mariners. And if, after such judgment, such ship or vessel is fit to proceed on her intended voyage, or after procuring such men, provisions, stores, repairs or alterations, as may be directed, the said seamen or mariners, or either of them, shall refuse to proceed on the voyage, it shall and may be lawful for any justice of the peace to commit, by warrant under his hand and seal, every such seaman or mariner (who shall so refuse) to the common jail of the county, there to remain, without bail or mainprize, until he shall have paid double the sum advanced to him at the time of subscribing the contract for the voyage, together with such reasonable costs as shall be allowed by the said justice, and inserted in the said warrant, and the surety or sureties of such seaman or mariner (in case he or they shall have given any) shall remain liable for such payment; nor shall any such seaman or mariner be discharged upon any writ of habeas corpus, or otherwise, until such sum be paid by him or them, or his or their surety or sureties, for want of any form of commitment, or other previous proceedings: *Provided*, That sufficient matter shall be made to appear, upon the return of such habeas corpus,

and an examination then to be had, to detain him for the causes herein before assigned.

Sect. 4. "If any person shall harbour or secrete any seaman or mariner belonging to any ship or vessel, knowing them to belong thereto, every such person, on conviction thereof before any court in the city, town, or county, where he, she, or they may reside, shall forfeit and pay ten dollars for every day which he, she, or they shall continue so to harbour or secrete such seaman or mariner, one half to the use of the person prosecuting for the same, the other half to the use of the United States; and no sum exceeding one dollar shall be recoverable from any seaman or mariner by any one person, for any debt contracted during the time such seaman or mariner shall actually belong to any ship or vessel, until the voyage for which such seaman or mariner engaged shall be ended.

Sect. 5. "If any seaman or mariner, who shall have subscribed such contract as is herein before described, shall absent himself from on board the ship or vessel in which he shall so have shipped, without leave of the master, or officer commanding on board; and the mate or other officer having charge of the log-book shall make an entry therein of the name of such seaman or mariner, on the day on which he shall so absent himself, and if such seaman or mariner shall return to his duty within forty-eight hours, such seaman or mariner shall forfeit three days pay for every day which he shall so absent himself, to be deducted out of his wages; but if any seaman or mariner shall absent himself for more than forty-eight hours at one time, he shall forfeit all the wages due to him, and all his goods and chattels which were on board the said ship or vessel, or in any store where they may have been lodged at the time of his desertion, to the use of the owners of the ship or vessel; and moreover shall be liable to pay to him or them all damages which he or they may sustain, by being obliged to hire other seamen or mariners in his or their place, and such damages shall be recovered with costs in any court, or before any justice or justices having jurisdiction of the recovery of debts to the value of ten dollars or upwards.

Sect. 6. "Every seaman or mariner shall be entitled to demand and receive from the master or commander of the ship or vessel to which they belong, one third part of the wages which shall be due to him at every port where such ship or vessel shall unlade and deliver her cargo before the voyage be ended, unless the contrary be expressly stipulated in the contract; and as soon as the voyage is ended, and the cargo or ballast be fully discharged at the last port of delivery, every seaman or mariner shall be entitled to the wages which shall be then due, according to his contract; and if such wages shall not be paid within ten days after such discharge, or if any dispute shall arise between the master and seamen or mariners, touching the said wages, it shall be lawful for the judge of the district where the said ship or vessel shall be, or in case his residence be more than three miles from the place, or of his absence from the place of his residence, then, for any judge or justice of the peace, to summon the master of such ship or vessel to appear before him, to shew cause why process should not issue against such ship or vessel, her tackle, furniture, and apparel, according to the course of admiralty courts, to

answer for the said wages; and if the master shall neglect to appear, or, appearing, shall not shew that the wages are paid, or otherwise satisfied or forfeited, and if the matter in dispute shall not be forthwith settled, in such case the judge or justice shall certify to the clerk of the court of the district, that there is sufficient cause of complaint whereon to found admiralty process, and thereupon the clerk of such court shall issue process against the said ship or vessel, and the suit shall be proceeded on in the said court, and final judgment be given according to the course of admiralty courts in such cases used, and in such suit all the seamen or mariners (having cause of complaint of the like kind against the same ship or vessel) shall be joined as complainants, and it shall be incumbent on the master or commander to produce the contract and log-book, if required, to ascertain any matters in dispute, otherwise the complainants shall be permitted to state the contents thereof, and the proof of the contrary shall lie on the master or commander; but nothing herein contained shall prevent any seaman or mariner from having, or maintaining any action at common law for the recovery of his wages, or from immediate process out of any court having admiralty jurisdiction, wherever any ship or vessel may be found, in case she shall have left the port of delivery where her voyage ended before payment of the wages, or in case she shall be about to proceed to sea before the end of the ten days next after the delivery of her cargo or ballast.

Sect. 7. "If any seaman or mariner, who shall have signed a contract to perform a voyage, shall at any port or place desert, or shall absent himself from such ship or vessel, without leave of the master, or officer commanding in the absence of the master, it shall be lawful for any justice of peace within the United States (upon the complaint of the master) to issue his warrant to apprehend such deserter, and bring him before such justice; and if it shall then appear by due proof, that he has signed a contract within the intent and meaning of this act, and that the voyage agreed for is not finished, altered, or the contract otherwise dissolved, and that such seaman or mariner has deserted the ship or vessel, or absented himself without leave, the said justice shall commit him to the house of correction or common jail of the city, town, or place, there to remain, until the said ship or vessel shall be ready to proceed on her voyage, or till the master shall require his discharge, and then to be delivered to the said master, he paying all the cost of such commitment, and deducting the same out of the wages due to such seaman or mariner.

Sect. 8. "Every ship or vessel belonging to a citizen or citizens of the United States, of the burthen of one hundred and fifty tons, or upwards, navigated by ten or more persons in the whole, and bound on a voyage without the limits of the United States, shall be provided with a chest of medicines, put up by some apothecary of known reputation, and accompanied by directions for administering the same; and the said medicines shall be examined by the same or some other apothecary, once at least in every year, and supplied with fresh medicines in the place of such as shall have been used or spoiled; and in default of having such medicine chest so provided, and kept fit for use, the master or commander of such ship or vessel shall provide and pay for all such advice, medicine, or attendance of physicians, as any of the



crew shall stand in need of, in case of sickness, at every port or place where the ship or vessel may touch or trade at during the voyage, without any deduction from the wages of such sick seaman or mariner.

Sect. 9. "Every ship or vessel, belonging as aforesaid, bound on a voyage across the Atlantic ocean, shall, at the time of leaving the last port from whence she sails; have on board, well secured under deck, at least sixty gallons of water, one hundred pounds of salted flesh meat, and one hundred pounds of wholesome ship-bread, for every person on board such ship or vessel, over and besides such other provisions, stores, and livestock, as shall by the master or passengers be put on board, and in like proportion for shorter or longer voyages; and in case the crew of any ship or vessel, which shall not have been so provided, shall be put upon short allowance in water, flesh, or bread, during the voyage, the master or owner of such ship or vessel shall pay to each of the crew one day's wages beyond the wages agreed on, for every day they shall be so put to short allowance, to be recovered in the same manner as their stipulated wages."

For subsequent laws relating to seamen, see act of May 28th, 1795 (*L. U. S. vol. 3, p. 332*) act of March 2d, 1799, (*L. U. S. vol. 4, p. 302*) act of July 16th, 1798 (*L. U. S. vol. 4, p. 223*) act of March 2d, 1799 (*L. U. S. vol. 4, p. 497*) act of May 3d, 1802 (*L. U. S. vol. 6, p. 176.*) See also title SEAMEN, in the body of this work.

(a) *Warrant against a seaman or mariner for neglecting to render himself on board a vessel, or for deserting, after having signed a contract to perform a voyage: on sect. 2.*

State of \_\_\_\_\_, to wit.

Whereas A C, commander of the \_\_\_\_\_ [*describe the vessel by her kind and name, as ship, sloop, &c*] of \_\_\_\_\_ hath this day made complaint to me, J P, a justice of the peace for \_\_\_\_\_ in the state aforesaid, that B S, who was bound by contract to perform a voyage in the said \_\_\_\_\_ or sloop \_\_\_\_\_ [*as the case may be*] from the port of \_\_\_\_\_ to the port of \_\_\_\_\_ did altogether neglect to render himself on board the said ship \_\_\_\_\_ [*or other vessel, as the case may be*] (or, having rendered himself on board the said ship, &c. did desert therefrom, so that the said ship, &c. did proceed to sea without him): These are therefore to require you to summon the said B S to appear before me, at \_\_\_\_\_ on the \_\_\_\_\_ day of \_\_\_\_\_ next, to shew cause why the said B S shall not forfeit and pay to the master (owner, or consignee, as the case may be) of the said ship, &c. a sum equal to that which was paid by the said A C to the said B S. at the time of signing the said contract, over and besides the sum so advanced and paid. Given under my hand, &c.

To \_\_\_\_\_ to execute.

For the forms of judgments and executions, see title WARRANTS in the body of this work.

(b) *Warrant to three persons to view the condition of a vessel bound to a foreign port, which is complained of as unfit for the voyage: on sect. 3.*

To A N, B N, and C N.

State of , to wit.

Whereas A M, commander of the ship and B S, and C S, two of the crew of the said ship, now lying at and bound on a voyage to the port of did this day appear before me, J P, a justice of the peace for in the state of and gave me information, that in the opinion of A M, mate of the said ship, and a majority of the crew of the same, the said ship is too leaky [or, *if unfit in her crew, tackle, &c. mention it*] to proceed on her intended voyage, and hath also made application to me to have the same viewed, according to the directions of the act of the congress of the United States in that case made and provided: These are therefore to require you forthwith to repair on board the said ship and to examine the same in respect to the defects and insufficiencies complained of, and to make report to me in writing under your hands, or the hands of two of you, whether in any and what respect the said ship is unfit to proceed on the intended voyage, and what addition of men, provisions, or stores, or what repairs or alterations in the body, tackle, or apparel, will be necessary. Given under my hand, this day of in the year and in the year of the independence of the United States.

(c) *Report of the viewers.*

State of , to wit.

In pursuance of a warrant to us directed by J P, a justice of the peace for in the state aforesaid, we have this day repaired on board the ship now lying at and bound on a voyage to the port of and having carefully examined into the several defects and insufficiencies complained of by the mate and a majority of the crew of the said ship do report as follows, viz. [*here make the report specially, and of such things as are required in the magistrate's warrant.*]

On this report the magistrate is to endorse his judgment, and of such objects as are prescribed by the above section.

The costs and damages attending the view are to be taxed by the magistrate, on a fair copy of the proceedings.

- (d) *Warrant to commit a seaman to prison who refuses to proceed on the intended voyage, after the ship is fit for sea: see sect. 3.*

State of \_\_\_\_\_, to wit.

To the keeper of the jail for

Whereas A M, commander of the ship \_\_\_\_\_ now lying at \_\_\_\_\_ and bound on a voyage to the port of \_\_\_\_\_ did make application to me, J P, a justice of the peace for the county of \_\_\_\_\_ to issue my warrant directed to three men in the neighbourhood, the most skilful in maritime affairs that could be procured, in order to have the condition of the said ship viewed, according to the act of the congress of the United States in that case made and provided, he, the said A M, accompanied by two of the crew of the said ship, having given me information, that in the opinion of the mate, and a majority of the crew of the said ship, she was unfit to proceed on her intended voyage; and whereas, in consequence of the said application, I did accordingly issue my warrant, directed to A N, B N, and C N, requiring them to report to me the defects and insufficiencies complained of in the said ship, by the mate and a majority of the crew of the same; and it being my judgment, upon the report of the said A N, B N, and C N, that the said ship \_\_\_\_\_ was fit to proceed on her intended voyage, I did endorse such judgment on the said report, and direct the master and mariners of the said ship in all things to conform thereto; but A S, B S, &c. crew of the said ship, do altogether refuse to proceed on the intended voyage: These are therefore to require you to receive the bodies of the said A S, B S, &c. into your jail and custody, and them therein safely to keep, without bail or mainprize, until they shall have severally paid to the said A M double the sum advanced to them respectively, at the time of signing the said original contract for the aforesaid intended voyage, to wit, until they shall pay the sum of \_\_\_\_\_ also the sum of \_\_\_\_\_ being the reasonable costs attending this warrant. Given under my hand and seal, this \_\_\_\_\_ day of \_\_\_\_\_ in the year \_\_\_\_\_ and in the \_\_\_\_\_ year of the independence of the United States of America.

NOTE. If the seamen are not already in custody, this last precept should be preceded by a warrant to bring the accused party before a justice of the peace. This warrant may be easily drawn, by observing the formal parts of the last precedent.

- (e) *Warrant against a seaman for absenting himself from on board a vessel.*

State of \_\_\_\_\_, to wit.

Complaint being this day made to me, J P, a justice of the peace for \_\_\_\_\_ in the state of \_\_\_\_\_ by A M, master of the ship \_\_\_\_\_ now lying at \_\_\_\_\_ that B S, one of the seamen of the said ship, who

had signed a contract for a voyage in the said ship from the port to the port of did absent himself from on board the ship, for the space of as appears by the entry in the log-book of the said ship. These are therefore to require you to summon the said B S to appear before me, at on the day of next, shew cause why he should not forfeit and pay [*as the forfeiture depends on the length of time the seaman is absent, the warrant must vary accordingly*] and moreover, all such damages as the said A M shall have sustained in consequence of being obliged to hire other seamen in place of the said B S, and do you then and there make return to you have executed this warrant. Given &c.

To to execute.

### Judgment.

On hearing the matter of the within complaint, it is considered that the said B S forfeit and pay unto the said A M the sum of (*according to the nature of the case*) also, the sum of for damages and the further sum of for the costs of this warrant.

J P

### (f) Warrant for a seaman's wages, on sect. 6.

State of , to wit.

WHEREAS, P S, one of the seamen of the now lying commanded by A M, hath this day made complaint to me, a justice of the peace for in the state aforesaid (the residence of the judge of the district of the United States being more than three miles from the place where the said vessel lies) that the (vessel) hath performed the voyage for which the said B S contracted, and the cargo and ballast of the said (vessel) hath been fully discharged at the last port of delivery, more than ten days past, and that there is now due to the said B S the sum of for wages in performing the said voyage, agreeable to contract which commander of the said (vessel) doth refuse to pay; these are therefore to require you to summon the said A M, to appear before me, at on the day of &c. to shew cause why process should not issue against the said (vessel) her tackle, furniture and apparel according to the course of admiralty courts, to answer for the wages; and then and there make return how you have executed precept. Given under my hand, at &c.

To to execute.

NOTE....If the application is for one third of the wages, to wit the seamen are entitled on their touching at a port and delivering vessel's cargo, before the voyage is ended, the same proceedings to be had as in the last case. The above warrant may also be adopted with such variations as will suit the case.

(g) *Certificate of the magistrate.*

I, J P, a justice of the peace for                      in the state of                      do hereby certify, that on the application of B S, one of the seamen of the ship (*sloop, &c.*) of                      commanded by A M, now lying at                      for wages due from the said commander to the said B S, I issued my warrant, requiring the said A M to appear before me, and shew cause why process, according to the course of admiralty courts, should not issue against the ship (*sloop, &c.*)                      her tackle, furniture, and apparel, to answer for the said wages; but the said A M failing to appear [*or appearing, failing to shew that the wages are paid, or otherwise satisfied or forfeited*] it is therefore my opinion, that there is sufficient cause of complaint, whereon to found admiralty process. Certified this                      day of                      in the year                      and in the                      year of the independence of the United States of America.

To A C, clerk of the court of the }  
United States, for the district }  
of }

(h) *Warrant to apprehend a seaman, absenting himself from his vessel.*

State of                      ,                      to wit.

Complaint this day being made to me, J P, a justice of the peace for                      by A M, master of the ship                      now lying at the port of                      that B S, one of the seamen belonging to the said ship who is bound, by contract in writing, to perform a voyage in the said ship, hath deserted from the said ship, without the leave of the said A M: These are therefore to require you to apprehend the said B S, and to bring him before me, at                      on the                      day &c. to answer the premises, and to be dealt with according to law; and do you then and there make return how you have executed this warrant. Given &c.

To                      to execute.

(i) *Commitment of a seaman who had deserted.*

State of                      ,                      to wit.

To the keeper of the jail of                      .

Whereas B S, one of the seamen belonging to the ship (*sloop, &c.*) of                      commanded by A M, hath been arrested by my warrant, and brought before me, for deserting from the said ship, without the leave of the said A M; and it appearing to me, from due proof, that the said B S hath signed a contract for performing a voyage in the said ship, within the intent and meaning of the act of the congress of the United States, entitled, "An act for the government and regulation of seamen in the merchants service," and that the voyage agreed for is not finished, altered, or the contract otherwise dissolved, and that the said B S hath deserted from the said ship (*sloop, &c.*) without the leave of the owner thereof: These are therefore to require you to receive the body of the said B S, into your jail and custody.

and him therein safely to keep, until the said ship shall be ready to proceed on her voyage, or until the said A M shall require his discharge, and until the said A M shall pay the costs of this commitment. Given under my hand and seal, this       day of       in the year       and in the       year of the independence of the United States of America.

## SLAVES.

AS to the penalties for being engaged in the slave trade, see act of March twenty-second, 1794 (*Laws U. S.* vol. iii. p. 23.) For the prohibition of the further importation of slaves, and regulations to be observed in carrying them coastwise, see act of March second, 1807. *Ibid.* vol. viii. p. 262.

## TREASON.

BY act of April thirtieth, 1790 (*Laws U. S.* vol. i. p. 100, sect. 1.) "If any person or persons, owing allegiance to the United States of America, shall levy war against them, or shall adhere to their enemies, giving them aid and comfort within the United States, or elsewhere, and shall be thereof convicted, on confession in open court, or on the testimony of two witnesses to the same overt act of the treason whereof he or they shall stand indicted, such person or persons shall be adjudged guilty of treason against the United States, and shall suffer death."

Sect. 2. "If any person or persons, having knowledge of the commission of any of the treasons aforesaid, shall conceal, and not so soon as may be made known the same to the president of the United States, or some one of the judges thereof, or to the president or governor of a particular state, or some one of the judges or justices thereof, such person or persons, on conviction, shall be guilty of misprision of treason, and shall be imprisoned not exceeding seven years, and fined not exceeding one thousand dollars."

By the above recited law, sect. 29 "Any person who shall be accused and indicted of treason shall have a copy of the indictment, and a list of the jury and witnesses to be produced on the trial, for proving the said indictment, mentioning the names and places of abode of such witnesses and jurors, delivered unto him at least three entire days before he shall be tried for the same; and in other capital offences, shall have such copy of the indictment and list of the jury two entire days at least before the trial. And every person so accused, and

indicted for any of the crimes aforesaid shall be allowed and admitted to make his full defence by counsel learned in the law; and the court before whom such person shall be tried, or some judge thereof, shall, and they are hereby authorised and required, immediately upon his request, to assign to such person such counsel, not exceeding two, as such person shall desire, to whom such counsel shall have free access at all seasonable hours; and every such person or persons accused or indicted of the crimes aforesaid shall be allowed and admitted in his said defence to make any proof that he or they can produce, by lawful witness or witnesses, and shall have the like process of the court where he or they shall be tried, to compel his or their witnesses to appear at his or their trial, as is usually granted to compel witnesses to appear on the prosecution against them."

See title MURDER.

The precedents, under title FORGERY, in this *Appendix*, may be adopted here, with such variations as will express the crime of TREASON.

THE following points respecting criminal prosecutions under the laws of the United States, not falling under any particular head, were reserved for the conclusion of this *Appendix*.

BY act of April thirtieth, 1790 (*Laws U. S.* vol. i. p. 113, sect. 32.) "No person or persons shall be prosecuted, tried or punished, for treason or other capital offence, wilful murder or forgery excepted, unless the indictment for the same shall be found by the grand jury, within three years next after the treason or capital offence aforesaid shall be done or committed; nor shall any person be prosecuted, tried or punished, for any offence not capital, nor for any fine or forfeiture under any penal statute, unless the indictment or information for the same shall be found or instituted within two years from the time of committing the offence, or incurring the fine or forfeiture aforesaid: *Provided*, that nothing herein contained shall extend to any person or persons fleeing from justice.

Sect. 33. "The manner of inflicting the punishment of death shall be by hanging the person convicted, by the neck, until dead."

FINIS.

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TO THE

## NEW VIRGINIA JUSTICE, &c.

**¶** The words printed in capital letters are principal titles in the body of the work; those printed in *italics* are titles in the Appendix, No. 1 and No. 2.

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## ERRATA.

THE reader is requested to mark the following corrections, with a pen, before he peruses the  
The letter *t*, following the number of the line, denotes so many lines from the top of the page,  
letter *b*, so many lines from the bottom.

103, line 8 t, for realized, read *relaxed*.  
103, line 23 t, for or, read *and*.  
131, bottom line, for Russell, read *Rustell*.  
180, line 6 t, for Butler, read *Buller*.  
196, line 6 t, for 1809, read 1789.  
112, line 24 t, for justices, read *judges*.  
194, line 1 t, for entry, read *entry*.  
127, line 12 t, for to, read *by*.  
127, line 6 b, for have, read *prove*.

Page 230, line 4 b, for verdict, read *writ*.  
233, line 11 b, insert not, after *produce*.  
236, line 13 t, insert the above, before *rule*.  
230, line 2 and 4 b, for Cowp. read *Campbell*.  
240, line 3 t, for Cowp. read *Campbell*.  
248, line 6 t, for seizing, read *seize*.  
267, line 18 t, for of, read *at*, before the blank.  
342, line 1 b, for 1796, read 1769.  
348, line 9 t, for overseers, read *owners*.

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